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90-853

Case No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

BANK OF BOULDER,
A COLORADO CORPORATION,

Defendant-Appellant,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
A UNITED STATES CORPORATION,

Plaintiff-Appellee.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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November 17, 1990

QUESTIONS PRESENTED FOR REVIEW

1. Did the decision below err in concluding that 12 U.S.C. § 1823(c)(2)(A) permits the Federal Deposit Insurance Corporation ("FDIC"), as the receiver of a state chartered commercial bank, to transfer the right to draw on a letter of credit to itself as a United States corporation, notwithstanding that the letter of credit is non-transferable by contract and under uniform state law and international custom and practice, and notwithstanding that the letter of credit satisfies the requirements of 12 U.S.C. § 1823(e) and *Langley v. FDIC*?

2. If so, did the decision below err in promulgating a novel federal common law rule allowing the FDIC, as the receiver of a state chartered commercial bank, to transfer the otherwise non-transferable letter of credit to itself as a United States corporation, even though the letter's transfer restriction satisfies both § 1823(e) and the rule of *D'Oench Duhme & Company v. FDIC*, and even though the record and prior decisions fail to establish the legislative facts relied upon by the Court?

PARTIES

In addition to the parties listed in the caption of this Petition, the American Bankers Association, Washington, D.C. appeared as *amicus curiae* in the proceedings below.

PARENT AND SUBSIDIARY CORPORATIONS

Defendant-Appellant Bank of Boulder is a wholly owned subsidiary of Boulder Bancorporation, a Colorado corporation, duly qualified and acting as a bank holding company pursuant to the Bank Holding Company Act of 1956, 12 U.S.C. § 1841 *et seq.* Bank of Boulder does not have any subsidiary corporation or company.

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DECISIONS BELOW

This is an appeal from the decision entered by the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit") in *FDIC v. Bank of Boulder,* No. 86-1071, 911 F.2d 1466 (10th Cir. 1990) (hereinafter, "FDIC II"), an *en banc* rehearing of the Tenth Circuit's decision in *FDIC v. Bank of Boulder,* No. 86-1071, 865 F.2d 1134 (10th Cir. 1988) (hereinafter, "FDIC I"). Copies of both opinions are contained in Appendix A to this Petition.

The appeal before the Tenth Circuit was taken from an order of dismissal entered by the United States District Court for the District of Colorado in accordance with its Memorandum Opinion and Order entered in *FDIC v. Bank of Boulder,* No. 85-Z-764, 622 F. Supp. 288 (D. Colo. 1985). A copy of that Memorandum Opinion and Order is appended as part of Appendix A.

JURISDICTION

The judgment sought to be reviewed was entered on August 20, 1990. The statutory provision believed to confer jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U.S.C § 1254.

APPLICABLE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES OR REGULATIONS[1]

I. The following provisions of the Federal Deposit Insurance Act, 12 U.S.C. §§ 1811, *et seq*:

A. 12 U.S.C. § 1819 (Fourth), (Eighth), (Ninth).

B. 12 U.S.C. § 1821(b), (e), (g).

C. 12 U.S.C. § 1823(c)-(f)(4).

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1 Verbatim transcripts of the listed statutes, as they appeared in 1983, are contained in Appendix B to this Petition.

D. 12 U.S.C. § 1830.

E. 12 U.S.C. § 1831d(a).

II. The following provisions of the Colorado Banking Code of 1957, C.R.S. § 11-1-101, *et seq*:

A. C.R.S. § 11-1-102(3).
(For Definition Reference Only).

B. C.R.S. § 11-2-102(1).

C. C.R.S. § 11-5-102 to -106.

III. The following provisions of the Colorado Uniform Commercial Code, C.R.S. § 4-1-101, *et seq*:

A. C.R.S. § 4-5-103(1)(a), (c), (d), (g).
(For Definition Reference Only).

B. C.R.S. § 4-5-109(1), (2).

C. C.R.S. § 4-5-112.

D. C.R.S. § 4-5-116.

STATEMENT OF THE CASE

On June 30, 1982, Bank of Boulder (the "Bank"), a Colorado-chartered commercial bank, issued a letter of credit (the "letter") in the amount of $27,000.00 to and for the benefit of Dominion Bank of Denver ("Dominion"), another Colorado-chartered commercial bank. The letter was purportedly issued in connection with a loan made by Dominion to a Mr. Gill Reed (the "Reed loan"), and provided on its face that it was "subject to the 'Uniform Customs and Practices

for Documentary Credits [UCP]' (1974 Revision), International Chamber of Commerce Brochure No. 290."[2]

On September 30, 1983, the Colorado State Bank Commissioner (the "Commissioner"), acting under Colorado law, assumed possession of Dominion and tendered receivership of Dominion to the Federal Deposit Insurance Corporation ("FDIC") under Section 105, Article 5 of the Colorado Banking Code of 1957, C.R.S. § 11-5-105. FDIC accepted the tendered appointment. As receiver, FDIC then entered into two contracts concerning Dominion's assets and liabilities. The first was a Purchase and Assumption Agreement with Central Bancorporation , Inc. ("Central"), pursuant to which Central agreed to assume certain liabilities and purchase certain assets of the receivership estate.[3] The second was a Contract of Sale between FDIC, as receiver, and FDIC in its corporate capacity ("FDIC Corporate"), whereunder the receiver sold the corporation "all the receiver's right, title and interest in all assets not purchased by [Central] pursuant to the Purchase and Assumption Agreement", in exchange for a cash payment equal to the liabilities assumed by Central, less the assets purchased and premium paid by Central pursuant to the Purchase and Assumption Agreement. The Contract of Sale further provided that the receiver would retain all information relating to the purchased assets, and that any surplus received by the Corporation through the liquidation of the purchased assets would be paid over to the receiver. On September 30, 1983, the District Court in and for the City and County of Denver, Colorado, upon *ex parte* petition by the

2 Article 46 of the 1974 UCP provides that "[a] credit can be transferred only if it is expressly designated as 'transferable' by the issuing bank", here, Bank of Boulder. The letter was not expressly designated as "transferable".

3 The Purchase and Assumption Agreement does not appear in the record. Consequently, the courts below were appraised of its terms, provisions and conditions only through the representations of counsel for FDIC.

FDIC, as receiver, and pursuant to Colorado law, entered its Order authorizing the transactions contemplated by the Purchase and Assumption Agreement and the Contract of Sale. (Whether applicable Colorado law contemplates or authorizes such a transaction, which essentially removes supervision of the receivership from the Colorado courts contrary to provisions of the Colorado Banking Code of 1957, was not argued or otherwise presented to the courts below for consideration.)

On October 5, 1984, FDIC attempted to draw on the letter "as Liquidator of Dominion Bank of Denver". Bank of Boulder, through counsel, dishonored the draft. FDIC did not challenge the dishonor, but, rather, submitted a second draft on January 15, 1985. This draft did not expressly identify FDIC's status as drawer, but was signed by Mary I. Urvanejo, the appointed liquidator of Dominion Bank of Denver. Bank of Boulder dishonored the second draft because FDIC was not named as beneficiary under the letter and the letter was non-transferable as a matter of contract and law.

Following Bank of Boulder's second dishonor, FDIC brought suit in the United States District Court for the District of Colorado, alleging that Bank of Boulder had improperly dishonored its demand for payment in contravention of duties imposed by Colorado law. Alternatively, FDIC claimed that it was the assignee of proceeds due under the letter and, as such, held a perfected security interest in the letter and was entitled to collect such proceeds pursuant to Colorado law. Bank of Boulder moved to dismiss under Fed. R. Civ. P. 12(b)(2) and (6), arguing that the District Court lacked subject matter jurisdiction to the extent that the claim was brought by FDIC as Dominion's receiver, and, to the extent that FDIC purported to act in its corporate capacity, it had failed to state a claim as transferee of the letter because the letter was non-transferable as a matter of contract and

law. The District Court granted the Bank's motion, concluding that the sale of the letter to FDIC Corporate violated the terms of the letter, and that FDIC Corporate was therefore not properly before the court. The District Court dismissed the Complaint without prejudice to the institution of an appropriate state court action by FDIC as Dominion's receiver.

On appeal, a split panel of the Tenth Circuit reversed, concluding that the state law prohibition against transfer of the letter was overridden by authority granted FDIC Corporate under 12 U.S.C. § 1823(c)(2)(A) and federal common law. On rehearing *en banc*, a split court again reversed the District Court's dismissal. Writing for the court, four judges concluded that 12 U.S.C. §1823(c)(2)(A) empowers FDIC Corporate to purchase any assets held by FDIC as a state bank receiver, including those which are non-transferable under state law (here, C.R.S. § 4-5-116(1)), and therefore preempts all state law restrictions on transfer. Alternatively, the court concluded that even if § 1823(c)(2)(A) did not preempt state law, federal common law required a uniform rule permitting the transfer of letters of credit from FDIC as state bank receiver to FDIC Corporate. Since, on either ground, the transfer from FDIC as receiver to FDIC Corporate was valid, the court concluded that federal jurisdiction attached under 12 U.S.C. § 1819 (Fourth). One judge concurred with the majority's ultimate conclusion, but disavowed its reliance on statutory preemption and federal common law on the ground that Colorado law was consistent with the majority's reading of § 1823(c)(2)(A). Three judges dissented on the grounds, *inter alia*, that the majority's opinion was driven by erroneous factual assumptions, that nothing in § 1823(c)(2)(A) permits FDIC Corporate to alter the express contractual provisions of assets it acquires from FDIC as a state bank receiver, and that FDIC Corporate had failed to establish a sufficient conflict with federal objectives to warrant the promulgation of a novel rule of federal common law.

JURISDICTION OF THE FEDERAL COURT

Jurisdiction in the United States District Court for the District of Colorado and the United States Court of Appeals for the Tenth Circuit was predicated on 12 U.S.C. § 1819 (Fourth).

REASONS FOR ALLOWANCE OF THIS WRIT

I. THE DECISION BELOW INTERPRETS 12 U.S.C. § 1823(c)(2)(A) IN A MANNER WHICH CONFLICTS WHICH THE TERMS AND SETTLED JUDICIAL INTERPRETATION OF OTHER IMPORTANT PROVISIONS OF THE FEDERAL DEPOSIT INSURANCE ACT, IN PARTICULAR, 12 U.S.C. §§ 1819 (FOURTH), 1821(e) AND 1823(d) AND (e), AND WITH THIS COURT'S OPINION IN *LANGLEY V. FDIC.*

As set forth below, the Tenth Circuit's conclusion that § 1823(c)(2)(A) permits FDIC Corporate to vitiate state law and contractual restraints on the transfer of an asset in the hands of FDIC as receiver of a state bank places the operation of that section in direct opposition to provisions of the Act which both on their face and by settled judicial interpretation contemplate the enforcement of state law and contractual restraints on transfer. The court arrives at this anomolous result by ignoring the clear intention of the Act to recognize state law limits on FDIC when acting as receiver of a state chartered bank, by inaccurately evaluating the operation of § 1823(c), both on its own terms and in the broader context of the Act, and by ignoring the principle of freedom of contract at work in 12 U.S.C. § 1823(e) and repeatedly recognized in judicial interpretations of that provision, including this

Court's recent opinion in *Langley v. FDIC*, 484 U.S. 86 (1987).

A. The Court's Interpretation of § 1823(c)(2)(A) Conflicts With Other Provisions of the Act, Principally §§ 1819 (Fourth), 1821(e) and 1823(d), Which Recognize State Law Limits on the Rights and Powers of FDIC as Receiver of a State Chartered Bank.

Throughout its history the United States has fostered a dual banking system, under which, in keeping with basic principles of federalism, the chartering and governance of commercial banks has been split and balanced between state and federal authorities. Like other federal banking statutes (*see*, e.g., the McFadden Act, Ch. 191, 44 Stat. 1224, (1927) (codified as amended at 12 U.S.C. § 36) (concerning branch banks)), the Federal Deposit Insurance Act (the "Act") has maintained state-federal balance in a number of ways.[4] Thus, for example, the Act provides that federal banking agencies are generally required to accept and give due consideration to the views and recommendations of state supervisory agencies in determining whether to disapprove proposed acquisitions of the voting shares of state banks. 12 U.S.C. § 1817(j)(2) (1982). In addition, before terminating the insurance of a state bank, the FDIC's Board of Directors must notify the state supervisory authority of the underlying practices and violations "for the purpose of securing the correction thereof". 12 U.S.C. § 1818(a) (1982). Federal banking

4 The Bank recognizes that significant alterations in this state-federal balance were effected by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), P.L. 101-73, 103 Stat. 187 (1989). However, two observations are in order. First, the decision below contains no reference to the provisions of FIRREA because those provisions do not govern the transactions at issue in this case, nor do those provisions govern issues arising in the context of the hundreds of bank closures effected prior to the enactment of FIRREA. *Infra*, Note 7. Second, as FIRREA confirms, it is up to Congress, not the Courts, to effect redistributions of federal-state power.

agencies must also provide state authorities with notice of their intent to institute cease and desist or suspension or removal proceedings against a state bank or its employees, and must await satisfactory state corrective action before proceeding. 12 U.S.C. § 1818(m) (1982). Moreover, in the event of closure, the rights of depositors and other creditors of state banks are to be determined in accordance with state law, 12 U.S.C. § 1821(g), and the Corporation's use of its extraordinary acquisition authority requires approval of or consultation with state supervisory authorities. 12 U.S.C. § 1823(f)(2), (3). Finally, the Act expressly provides that it is not intended to discriminate "against State non-member banks and in favor of national or member banks; but the purpose is to provide all banks with the same opportunity to obtain and enjoy the benefits of this Act". 12 U.S.C. § 1830.[5]

The Act's balancing of state and federal interests is nowhere more apparent than in its provisions dealing with FDIC's role as receiver of a state chartered bank. To begin with, the Act cedes to the state the sole and exclusive authority to close or take possession of state chartered banks. In

5 The Act's legislative history evidences a strong commitment to a balanced state-federal approach. *See*, e.g., S. Rep. No. 1482, 89th Cong., 2nd Sess., *reprinted in* 1966 U.S. Code Cong. & Admin. News 3532, 3538-39 ("the Committee did not wish to take any action which would do violence to the balance between State and Federal functions and responsibilities which underlies the dual banking system . . . ."); S. Rep. No. 95-1073, 95th Cong., 2nd Sess. 1, 6 *reprinted in* 1978 U.S. Code Cong. & Admin. News 1421, 1426 ("One of the essential features of the U.S. banking system has been its duality—the option of a State or Federal charter for the conduct of a banking business."); *Id.* at 9 *reprinted in* 1978 U.S. Code Cong. & Admin. News at 1429 ("this Nation's dual-banking system . . . has served local, national, and international credit needs well throughout our history."); *Id.* at 12, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 1432 ("Federal banking law should, to the greatest extent possible, be limited to matters of national interest and concern, that either are not the province of the States or are beyond their ability to cognize and regulate").

Colorado, the decision to close or take possession of a state bank is made by the Commissioner and the State Banking Board, acting pursuant to authority granted under the Colorado Banking Code of 1957, C.R.S § 11-1-101, *et seq* (the "Code"). C.R.S. § 11-5-102. Although the Commissioner must give notice of his possession to the FDIC, the determination of whether possession should be taken, and, thereafter, whether the bank should be liquidated or reorganized, belongs solely to the Commissioner and the Banking Board. C.R.S. §§ 11-5-102 to -104. Consequently, the Commissioner and Banking Board may close and liquidate a Colorado bank such as Dominion, and thereby require FDIC to pay all insured deposit liabilities, without any prior consultation with or consent from FDIC.

FDIC does not assume an active role in the liquidation or reorganization of a Colorado bank unless and until, on the order of the Banking Board, the Commissioner tenders appointment as liquidator to FDIC. C.R.S. § 11-5-105(1), (2). Thus, although 12 U.S.C. § 1819 (Ninth) generally authorizes FDIC to act as receiver, its appointment as such in the case of a failed state bank derives from the decisions of state officials acting in accordance with state law. *See*, 12 U.S.C. § 1821(e).[6] Of course, FDIC's authority to engage in a purchase and

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6 The court below cites § 1821(e) for the proposition that FDIC is statutorily required to accept appointment as receiver of a state chartered bank and, therefore, cannot avoid acting in two capacities during the course of a purchase and assumption transaction. *FDIC II*, 911 F.2d at 1470. Section 1821(e) provides, in pertinent part, that:

> Whenever any insured State bank . . . shall have been closed . . . by the authority having supervision of such bank . . . *on account of inability to meet the demands of its depositors*, the Corporation shall accept appointment as receiver thereof, if such appointment is tendered by the authority having supervision of such bank and is authorized or permitted by State law. (Emphasis supplied)

(footnote continues)

assumption transaction such as the one entered into in this case with Central arises only after it has been appointed receiver pursuant to state law.

Under both the Act and the Code, FDIC's rights, powers and privileges as receiver of a state chartered bank are governed by state law. 12 U.S.C. §§ 1819 (Fourth) and 1821(e); C.R.S. § 11-5-105(4). Thus, for example, any suit to which FDIC is a party as a receiver of a state bank, "and which involves only the rights or obligations of depositors, creditors, stockholders and such state bank under state law . . . " must be tried in state court. 12 U.S.C. § 1819 (Fourth). In addition, as receiver of a state bank, FDIC's authority to offer assets of the receivership estate for sale or pledge to the Corporation is contingent "upon receiving permission from the appropriate State authority in accordance with the express provisions of State law. . . . " 12 U.S.C. § 1823(d); C.R.S. § 11-5-106. Indeed, Congress' intention to prefer state law governance in these areas has been sufficiently clear that, prior to the decision in this case, courts of appeal which had reached the issue had unequivocally acknowledged state law control over the actions of FDIC as receiver of a state bank. *Trigo v. FDIC*, 847 F.2d 1499, 1502-03 n.4 (11th Cir. 1988) ("state law controls the FDIC when the agency is acting as receiver of a failed bank. . . . As receiver of a failed bank . . . the FDIC is not pursuing a strong federal policy.

(footnote continued)

The record in this case fails to disclose facts sufficient to determine whether Dominion was closed "on account of inability to meet the demands of its depositors", since it is unclear whether the Commissioner assumed possession of Dominion "for the purpose of liquidation without adequate provision being made for its depositors." 12 U.S.C. § 1821(b). The fact that Dominion was not liquidated, but, rather, became the subject of a purchase and assumption transaction, may indicate that the Commissioner did not take possession "for the purpose of liquidation" and that, consequently, FDIC was not obligated to accept the appointment as Dominion's receiver.

The FDIC as receiver merely takes the place of any receiver that might be appointed under state law."); *FDIC v. Sumner Financial Corp.*, 602 F.2d 670, 679 (5th Cir. 1979) (Congress intended that supervision and regulation of state banks be primarily the state's affair; consequently, when acting as a receiver, FDIC "is to be treated exactly as any other receiver would be").

In sum, throughout its history the Act and its provisions pertaining to the regulation of state banks have recognized the legitimate domain and operation of state law. By holding that FDIC as receiver of a state bank is entitled to ignore a state law restraint on the transfer of an asset of the receivership estate—that is, by holding that FDIC receiver is not bound by and subject to the very law from which its appointment springs—the court below creates an open-ended power in the receiver which not only finds no grounding in the text of the Act, but is directly at odds with that text and its previous judicial interpretation.

The court reaches its result by focusing almost exclusively on 12 U.S.C. § 1823(c)(2)(A), a provision aimed only at actions taken by FDIC in its *corporate* capacity, and by ignoring the provisions of the Act and related case authorities which address FDIC's powers as receiver. For example, the majority's quotation of 12 U.S.C. § 1823(d), (*FDIC II*, 911 F.2d at 1473) omits the clause of that provision which conditions the receiver's authority to sell or pledge assets of the failed bank on "permission from the appropriate State authority in accordance with the express provisions of State law. . . . " This omission, like others, is both unexplained and inexplicable. Surely the court understood that statutes are to be interpreted as a whole, *United States v. Morton*, 467 U.S. 822, 828 (1984); *Pollard v. Bailey*, 87 U.S. (20 Wall.) 520, 525-26 (1874); that the meaning of a provision must account for context and related provisions, *Neal v. Clark*, 95 U.S. 704, 708-09 (1877); *Peck v. Jenness*, 48 U.S. (7 How.)

611, 622 (1849); that interpretation must give effect to each provision of a statute and not render any part inoperative, *Colautti v. Franklin*, 439 U.S. 379, 392 (1979); *Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879); and that an intention to depart from settled law and policy will not be presumed, but must be clearly expressed and demonstrated, *Green v. Bock Laundry Mach. Co.*, ___ U.S. ___, 109 S.Ct. 1981, 1991 (1989); *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 390 (1805). Yet construing § 1823(c)(2)(A) as a preemption of uniform state law and international custom relating to the transferability of letters of credit is only possible if these fundamental principles are thoroughly disregarded.[7]

The conflict and inconsistency which the court below creates between § 1823(c)(2)(a) and §§ 1819 (Fourth), 1821(e) and 1823(d), and between its view and the views expressed in *Trigo* and *Sumner Financial Corp.*, can only create substantial uncertainty concerning the rights and powers of FDIC when acting as a receiver of a state bank. In view of the fact that approximately 975 banks were closed during the years 1983 through 1989,[8] this uncertainty can hardly be dismissed as inconsequential.

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7 The Act's legislative history contains no indication whatsoever of an intent to treat § 1823(c)(2)(A) as a preemptive rule of federal property law, as opposed to a rule of administration delineating FDIC's authority to expend corporate funds. *See, e.g.*, H. Rep. No. 2564, 81st Cong., 2nd Sess., *reprinted in* 1950 U.S. Code Cong. & Admin. News 3765, 3773-74; S. Rep. No. 97-536, 97th Cong., 2nd Sess. III, 5-6, 45, *reprinted in* 1982 U.S. Code Cong. & Admin. News 3054, 3059-60, 3099. In fact, where Congress intended provisions of the Act to preempt state law, it said so explicitly. *See*, 12 U.S.C. §§ 1823(f)(4)(i), 1831d(a).

8 This figure is based on the FDIC's 1983-1988 Annual Reports, indicating a total of 769 closures during that period. FDIC has yet to publish its 1989 Annual Report. However, preliminary figures related to Bank of Boulder by Ms. Modestine Johnson of FDIC's Research and Statistics Division indicate a total of 206 closures in 1989.

B. The Court's Interpretation of § 1823(c)(2)(A) Conflicts With the Operation and Settled Interpretation of § 1823(e), as Enunciated in Langley v. FDIC.

Section 1823(e) of the Act provides that "[n]o agreement which tends to diminish or defeat the *right, title or interest* of the Corporation in any asset acquired by it under [Section 1823] . . . shall be . . . valid against the Corporation unless [the] agreement . . . (emphasis supplied)" satisfies certain requirements of writing, approval and recording. These safeguards permit federal and state examiners to rely on bank records, discourage imprudent or ill considered practices by bank management, and protect against "collusive reconstruction" by bank insiders and their customers. *Langley v. FDIC*, 484 U.S. 86, 92, 95 (1987). As § 1823(e) clearly indicates, however, an agreement which satisfies its provisions is enforceable against FDIC Corporate, even though such enforcement might defeat or diminish the Corporation's right, title or interest in the asset, or otherwise diminish its recovery. Freedom of contract reigns, as long as the requisite procedures and formalities are satisfied: "[A]n agreement that meets [the requirements of § 1823(e)] prevails even if the FDIC did not know of it; and an agreement that does not meet them fails even if the FDIC knew. It would be rewriting the statute to hold otherwise." *Langley*, 484 U.S. at 95. *See, also, FDIC v. Aetna Casualty and Surety Co.*, 903 F.2d 1073, 1078 (6th Cir. 1990) (discussing freedom of contract as a "dominant public policy"); *FDIC v. Blue Rock Shopping Center, Inc.*, 766 F.2d 744, 752-53 (3rd Cir. 1985) (Section 1823(e) "protects the FDIC only against agreements not satisfying its requirements"). A corollary proposition, uniformly recognized by the appellate courts, is that § 1823(e) does not permit FDIC Corporate to defeat or ignore defenses arising from the text of agreements it seeks to enforce. *FDIC v. O'Neil*, 809 F.2d 350, 354 (7th Cir. 1987) ("that would be like

arguing that the FDIC could ignore the due date in a promissory note it has bought from a troubled bank, and call the loan immediately"); *accord, FDIC v. Rivera-Arroyo*, 645 F.Supp. 511, 521 (D. Puerto Rico 1986) (agreements which comply iwth § 1823(e) "*may* be opposed against FDIC, as a corporation, to defeat its right, title or interest in the asset . . . [T]he assets [FDIC] acquires cannot be expanded beyond their apparent face value, nor can the debtor's rights arising thereunder be eviscerated under the guise of some undefined federal policy" (emphasis in original)). *See, also, Commerce Federal Savings Bank v. FDIC*, 872 F.2d 1240, 1244-45 (6th Cir. 1989); *FDIC v. Panelfab Puerto Rico, Inc.*, 739 F.2d 26, 30 (1st Cir. 1984); *Howell v. Continental Credit Corp.*, 655 F.2d 743, 747 (7th Cir. 1981) (citing *Riverside Park Realty Co. v. FDIC*, 465 F. Supp. 305, 313 (M.D. Tenn. 1978)).

As observed by the dissent, the court's construction of § 1823(c)(2)(A) effectively expands the operation of that provision to allow FDIC Corporate to ignore or alter the express written provisions of assets it acquires from a failed bank's receiver, including contractual restraints on transfer, so as to create title, bar defenses to enforcement and, thereby, increase the value of those assets. *FDIC II*, 911 F.2d at 1480 (Baldock, J., dissenting). This construction of § 1823(c)(2)(A) not only goes well beyond the facial meaning of that provision, but, more importantly, creates an obvious and serious conflict between the operation of §§ 1823(c)(2)(A) and (e), such that the former provision eviscerates an agreement which the latter provision would enforce.[9] In effect, the court below has created § 1823(c)(2)(A) as an exception to §1823(e) and to the holding of *Langley*. Henceforth (as the court would have it) "[a]n agreement that meets [the requirements] of § 1823(e) prevails even if the FDIC did not know of

9 Neither the majority nor the dissent question that the letter and other documents relating to the Reed loan satisfy the requirements of § 1823(e).

it"[10]—unless the agreement defeats FDIC Corporate's right, title or interest in the asset through a bargained for restraint on transfer, in which case FDIC Corporate is free to rewrite the contract and enforce it as though the transfer restraint had never existed. The only legal justification offered by the court for this extreme departure from the text of the Act, the principle of freedom of contract it embodies, and its prior judicial interpretation is a series of cases dealing with the transferability of tort claims. *FDIC II*, 911 F.2d at 1473-74.[11] However, a tort claim, unlike a letter of credit, is usually not conceived of as an "agreement", and the behavior reinforced and fostered through freedom of contract has nothing to do with the behavior addressed by tort law. "[A] tort is not a commercial instrument which constitutes a medium of exchange." *FDIC II*, 911 F.2d at 1481 (Baldock, J., dissenting). Thus, naturally enough, decisions involving the transferability of tort claims do not—unlike this case—implicate the provisions and policies of § 1823(e).

It is of course difficult to project the extent to which the inconsistency created by the court's "new exception" to § 1823(e) will disrupt settled commercial expectations, or otherwise visit unforeseen costs and risks on parties to commercial transactions.[12] However, the Bank would submit that prior to the opinion below, issuers of non-transferable letters of credit had no reason to anticipate a federal departure from uniform state law and national and international custom, especially where the credit and related documents complied with the provisions of § 1823(e). As discussed at length in

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10 *Langley*, 484 U.S. at 95.

11 As discussed below, the majority also seeks to justify its result by assuming legislative facts which are inconsistent both with the factual assumptions underlying § 1823(e) and its interpretation in cases such as *Langley*. See, *infra*, pp. 18-24.

12 In this regard it should be noted that the inconsistency so created is not resolved by the enactment of FIRREA, and the court's construction of § 1823(c)(2)(A) may be applied to cases arising post-FIRREA.

both the panel and *en banc* dissents below, the letter of credit's commercial usefulness is predicated on the related doctrines of independence and strict compliance, both of which are materially compromised, to the detriment of both the issuer and the customer, by a rule permitting voluntary transfer of the beneficiary's rights. *FDIC I*, 865 F.2d 1134, 1142-46 (Baldock, J., dissenting); *FDIC II*, 911 F.2d at 1480-81 (Baldock, J., dissenting). Among other things, such a rule strips the customer of bargained for security[13] and creates substantial uncertainty regarding the extent of the issuer's obligation to look beyond the letter in determining whether to honor a non-complying draft. As to the latter point, the majority opinion below raises—but fails to answer—a number of troublesome questions. For example, is the issuer obligated to review the records of the state receivership court? Does such an obligation exist regardless of the cost imposed on the issuer? Is the issuer entitled to rely on the regularity and validity of state court proceedings? What are the issuer's obligations in the event it discovers a potential flaw in the state receivership action? What effect, if any, do these obligations, if any, have on the issuer's obligation to honor or dishonor the draft within the statutory deadline established by Article 5, Section 112 of the Uniform Commercial Code? See, *e.g.*, C.R.S. § 4-5-112. Such questions are even more troublesome when raised in cases involving international credits subject (like the letter at issue here) to the Uniform Customs and Practices for Documentary Credits promulgated by the International Chamber of Commerce.

In sum, the court's construction of the Act creates substantial conflict between § 1823(c)(2)(A) and §§ 1819 (Fourth), 1821(d) and 1823(d) and (e), and poses a direct

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13 Mr. Reed, the Bank's customer, was not made a party to FDIC's Complaint and, naturally, has not been heard from in this proceeding. The court's statutory analysis, like its common law analysis, makes no attempt to account for Mr. Reed's interests as a party to the letter.

challenge to *Langley*'s "bright line" interpretation of § 1823(e). This conflict raises a number of uncertainties and questions regarding any number of contractual relationships, and, specifically, regarding the operation of an important instrument of commercial exchange which is widely employed in both national and international transactions.[14] These problems, standing alone, are of sufficient magnitude to justify this Court's review.

II. THE COURT'S PROMULGATION OF A NOVEL FEDERAL COMMON LAW RULE OF TRANSFERABILITY IMPROPERLY ASSUMES LEGISLATIVE FACTS WHICH ARE INCOMPATIBLE WITH THOSE UNDERLYING *LANGLEY V. FDIC* AND RELATED CASES, AND IS INCONSISTENT WITH THE RATIONALE AND OPERATION OF 12 U.S.C. § 1823(e) AND THIS COURT'S DECISION IN *D'OENCH, DUHME & CO., INC. V. FEDERAL DEPOSIT INSURANCE CORP.*

Although it recognizes that "resort to federal common law is only necessary where Congress has not plainly spoken to the matter under consideration", *FDIC II*, 911 F.2d at 1474, and although it concludes that § 1823(c)(2)(A) is sufficiently clear to preempt contrary state law, the court below nonetheless proceeds to promulgate a novel rule of federal common law transferability as an alternative basis for its decision—perhaps anticipating this or another court's conclusion that "federal statutory law does not provide a clear answer to the transfer issue." *FDIC II*, 911 F.2d at 1477. As set forth below, in choosing and pursuing this alternative, the court ignores fundamental limits on its role as a finder of

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14 In June of 1985, outstanding standby letters of credit issued by banks in the United States amounted to $153.2 billion. Federal Reserve Bank of San Francisco, *Winter 1986 Economic Review*, 20.

fact. These departures, in turn, ultimately lead the court to assume legislative facts which are inconsistent with the factual underpinning of cases such as *Langley*, and, ultimately, to declare a rule and a rationale for that rule which is incompatible with both 12 U.S.C. § 1823(e) and the rationale and holding of *D'Oench, Duhme Co., Inc. v. FDIC*, 315 U.S. 447 (1942).

A. The Court's Promulgation of a Novel Federal Common Law Rule of Transferability of Letters of Credit is Based upon Presumed Legislative Facts Which are Nowhere Evidenced in the Record or in the Sources Cited by the Court, and Which are Inconsistent With Prior Judicial Assumptions.

As the dissent observes, the underlying factual assumption which animates the court's opinion is that purchase and assumption transactions must be accomplished within time constraints which preclude a detailed review of the failed bank's assets. *FDIC II*, 911 F.2d at 1478 (Baldock, J., dissenting). This supposition is premised almost exclusively on citation to case authority, including this Court's opinion in *Langley*. *FDIC II*, 911 F.2d at 1470 n.3. However, although *Langley* and the other cited cases acknowledge the speed with which purchase and assumption transactions occur (while deciding the issues arising under § 1823(e) and the *D'Oench, Duhme* doctrine), *none* of these cases finds or concludes that the time constraints involved in a purchase and assumption transaction necessarily preclude a detailed asset review, or that the FDIC does not in fact conduct such a review prior to the bank's closing or the consummation of the purchase and assumption transaction. The factual basis which the court assumes as an essential justification for its promulgation of a novel rule of federal common law (as well as its interpretation of § 1823(c)(2)(A)) simply finds no express support in the authorities cited.

More significantly, even if the cases cited by the court can be read to imply or suggest a basis for its factual claim, any such reading necessarily ignores fundamental institutional constraints. "It is emphatically the province and duty of the judicial department to say what the *law* is." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added). But when a court says that FDIC must make purchase and assumption evaluations "with great speed, usually overnight",[15] it is not making a statement of law, it is making a statement of fact. That statement is obviously not based on the court's independent knowledge of the fact, but, rather, on representations or evidence offered to it in the case at issue. Consequently, factual findings do not create precedent in the same sense as legal conclusions. *Spector v. United States,* 193 F.2d 1002, 1006 (9th Cir. 1952) ("[N]o principle of stare decisis or res judicata makes a finding of fact applicable to persons not parties to the action in which the finding is made"). Aside from its implicit due process concerns, such a limitation is necessitated by limits on the court's institutional competence. Courts may be misled or mistaken as to legislative facts; more important, the conventional wisdom of what

15 *Langley,* 484 at 91 (quoting *Gunter v. Hutcheson,* 674 F.2d 862, 865 (11th Cir. 1982) *cert. denied,* 459 U.S. 826 (1982)) (discussing a purchase and assumption transaction consummated in connection with the February 1976 closing of Hamilton National Bank of Chattanooga, Tennessee)).

constitutes a legislative fact may change,[16] or the legislative facts themselves may change from case to case.[17]

Not only does the court's opinion come perilously close to treating legislative facts as "law", its reading of factual statements made in earlier opinions ignores the legal context in which those statements were made, with predictable results. Beginning with *Langley*, each of the cases cited by the court concerns the question of FDIC Corporate's susceptibility to defenses which are not disclosed on the face of an asset. Each of these decisions concludes that the assertion of such defenses is precluded, given controlling legal parameters and

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16 For example, in 1908 this Court found, as a fact, that "woman has always been dependent upon man". *Muller v. Oregon*, 208 U.S. 412, 421 (1908). In 1857, the Court discussed the "axiom of morals as well as politics" that members of the African race were "regarded as beings of an inferior order". *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857). However, no one would seriously attempt to rely upon the authority of these decisions in order to establish the same "facts" today.

17 For example, as previously noted, *Langley's* comment about FDIC's need to make evaluations "usually overnight" was not an original conclusion, but merely a repetition of language appearing in the then five year old *Gunter* opinion. And *Gunter* itself concerned a bank failure occurring some seven and one-half years prior to the failure at issue in this case. In argument before the Tenth Circuit *en banc*, the Bank and *amicus curiae* American Bankers Association provided the Court with excerpts from the book *Bailout* (Basic Books, Inc. 1987) authored by Irvine Sprague, a recently retired member of the Board of Directors of the FDIC. In his book, Mr. Sprague describes bank failure practices developed at FDIC during the 1980's, under which the FDIC commences planning for a bank failure at least 90 days in advance of actual closure. Part of the planning process described by Mr. Sprague involves the compilation of a list of potential bidders for the assets of the bank, each of whom is provided with a "bid package" containing details of the bank's deposits, assets and contingencies, including standby letters of credit. The majority opinion simply dismisses Mr. Sprague's detailed description of FDIC's practices in favor of the more general descriptions found in *Langley, Gunter* and related cases.

(footnote continues)

the need of federal and state banking authorities to make quick and reliable evaluations of a failing bank's assets.[18] The mere existence of such a need obviously implies that state and federal banking authorities have the wherewithal, at least in most cases, to engage in a detailed review of a failing bank's assets prior to closure. In fact, the existence of such a review

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(footnote continued)

Some of the bank merger cases provide a further illustration of the point. Antitrust laws prohibit bank mergers which may lead to anticompetitive practices within the relevant geographic and product markets. The determination of what constitutes the "relevant market" is largely factual. In early cases such as *United States v. Philadelphia Nat'l. Bank*, 374 U.S. 321 (1963), the courts determined that savings and loan associations and other financial intermediaries did not constitute part of the relevant market because commercial bank services were economically, i.e., factually, unique. Those "economic facts" began to change in the 1970's, and the courts have, in consequence, shown a willingness to reconsider the earlier legal conclusions which had been based on different facts. *See, e.g., United States v. Connecticut Nat'l. Bank*, 418 U.S. 656 (1974).

18 For example, in *Langley*, this Court observed (immediately after quoting *Gunter*) that "[n]either the FDIC nor state banking authorities would be able to make reliable evaluations if bank records contained seemingly unqualified notes that are in fact subject to undisclosed conditions." 484 U.S. at 91-92. In *Gunter* itself, the Court observed that in order to make the cost analysis required under the statutory precursor to 12 U.S.C. § 1823(c)(4)(A):

> . . . the FDIC must have some method to evaluate its potential liability in a purchase and assumption versus its potential liability from a liquidation. *Because of the time constraints involved, the only method of evaluating potential loss open to the FDIC is relying on the books and records of the failed bank* to estimate what assets would be returned by a purchasing bank and to estimate which of those assets ultimately would be collectible. *Id.*, 674 F.2d at 870. (emphasis supplied)

not only lends substantial equitable force to decisions precluding the assertion of "secret" or "undisclosed" conditions,[19] but also constitutes a principal administrative justification for those decisions and § 1823(e)—that is, the assertion of "secret" or "undisclosed conditions" is precluded under both statutory and decisional law *so that* FDIC can accomplish and rely on a detailed asset review under the time constraints of a purchase and assumption transaction. *Langley*, 484 U.S. at 91. Yet it is precisely the contrary assumption, viz., that FDIC cannot review and rely on a failing bank's records, which underlies and justifies the majority opinion in this case. Thus, by reading the factual descriptions in *Langley* and related cases without reference to their legal context, the majority opinion not only misapprehends the import of those descriptions but, in addition, imputes an underlying assumption to them (the *impossibility* of detailed asset review) which contradicts the force and logic of those cases.

The promulgation of novel federal common law implicates very serious questions concerning the institutional role and competence of courts established within a federal system predicated on the doctrine of separation of powers. *See*, generally, *Milwaukee v. Illinois*, 451 U.S. 304 (1981). By its very nature, federal law is enacted "against the background of the total *corpus juris* of the states", *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966) (quoting Hart & Wechsler, *The Federal Courts in the Federal System*, 435 (1953)), created through the states' use of their historic police powers, *Milwaukee v. Illinois*, 451 U.S. at 316. Unlike their state counterparts, federal courts "are not general common law courts and do not possess a general power to develop and

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19 *See, e.g., FDIC v. State Bank of Virden*, 893 F.2d 139, 144 (7th Cir. 1990) (describing what the FDIC saw (and didn't see) when it examined a participation agreement recorded in the books and records of the failed bank).

apply their own rules of decision." *Milwaukee v. Illinois*, 451 U.S. at 312. Thus, "[w]hether latent federal power should be exercised to displace state law is primarily a decision for Congress", *Wallis*, 384 U.S. at 68, and those instances in which the federal courts have authority to formulate and apply federal common law are "few and restricted". *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963). The promulgation of federal common law therefore requires a specific showing that a significant conflict exists between some federal policy or interest and the use of state law. *See, Wallis*, 384 U.S. at 68. In addition, the court must "reject generalized pleas for uniformity as substitutes for *concrete evidence* that adopting state law would adversely affect administration of the federal programs".[20] *United States v. Kimball Foods, Inc.*, 440 U.S. 715, 730 (1979) (emphasis supplied).

As set forth above, by ignoring these fundamental institutional and methodological constraints on its lawmaking

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20 This Court has historically resisted reliance on judicial notice as a substitute for "concrete evidence" in cases challenging the constitutional validity of state regulatory schemes. *Polk Co. v. Glover*, 305 U.S. 5, 9-10 (1938); *Anniston Mfg. Co. v. Davis*, 301 U.S. 337, 351-53 (1937); *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 210-11 (1934) ("[I]t is increasingly important that when it becomes necessary for the Court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appropriate determinations upon evidence, so the conclusion shall not be reached without adequate factual support. . . . This complexity of problems . . . makes it the more imperative that the Court in discharging its duty, in sustaining governmental authority within its sphere and enforcing individual rights, shall not proceed upon false assumptions."). Moreover, "[e]ven when constitutional principles are not involved, it is important that 'the conceptual legal theories be explored and assayed in the light of actual facts, not as a pleader's supposition,' so that courts may avoid 'elucidating legal responsibilities as to facts which may never be.'" *Estelle v. Gamble*, 429 U.S. 97, 112-113 n. 7 (1976) (Stevens, J., dissenting) (quoting *Shull v. Pilot Life Ins. Co.*, 313 F.2d 445, 447 (5th Cir. 1963)).

power, the court below has posited an assumed state of legislative fact which not only finds no support within the record, but which also contradicts an implicit factual predicate underlying the very authorities, such as *Langley*, on which the court relies. In consequence, this case presents a very important example of how lawmaking (or interpretation) in the absence of sufficient facts can yield incoherence. Review by certiorari is necessary to correct or reconcile the underlying factual incompatibility between this case and prior cases, such as *Langley* and *Gunter*, concerning the practices and capabilities of FDIC in dealing with a failing bank. At a more fundamental level, however, such review is necessary to reaffirm and perhaps clarify the institutional and methodological constraints which necessarily attend the promulgation of federal common law. If, as happened here, a novel rule of federal common law which vitiates uniform state law, international custom and private agreements can be promulgated in a case which comes before the Court under Fed. R. Civ. P. 12, in which the record is so sparse that the principal agreement relating to the issue before the Court (the Purchase and Assumption Agreement) is not present, and in which the legislative factual predicates for the new rule are gleaned exclusively from general descriptions contained in previous cases and from representations of counsel, then the constraints articulated in cases such as *Milwaukee*, *Kimball Foods*, and *Wallis* are effectively rendered meaningless. Hard facts make bad law. No facts make it worse.

B. The Court's Flawed Methodology Yields a Common Law Rule in Conflict With the Rationale and Operation of § 1823(e) and Langley v. FDIC.

Section 1823(e) directly addresses the enforceability of agreements which tend to defeat or diminish FDIC Corporate's title to assets acquired by it under § 1823(c)(2)(A). It is the only provision of the Act which does so, and, as previously discussed, it adopts a "bright line" approach: If the agreement has been properly documented, approved and

recorded, it is enforceable; if not, the contrary obtains. Any other result "rewrit[es] the statute". *Langley*, 484 U.S. at 95.

By predicating its federal common law analysis on legislative fact assumptions which, as previously demonstrated, are not only unfounded but run counter to the factual predicates underlying *Langley, Gunter* and related cases, the court below is driven to promulgate a novel federal common law rule vitiating a contractual restraint which is clearly entitled to enforcement under § 1823(e). The resulting conflict between the court's opinion and the holding of *Langley* is irreconcilable. Under *Langley*, if an agreement satisfies the requirements of § 1823(e), nothing stands in the way of FDIC's inquiry, hence its ability to protect itself and the insured bank, and the agreement prevails. *Id.* Under the court's opinion below, however, an agreement that meets the requirements of § 1823(e) does not prevail *because* the court assumes that FDIC *could not* know of it. Thus, because they operate from contradictory presuppositions of legislative facts, *Langley* and the court below, not surprisingly, reach inconsistent conclusions with respect to the meaning and operation of § 1823(e).

Absent express invitation to do so, federal courts are not free to supplement or "second-guess" Congressional enactments under the guise of federal common law. *Texas Industries, Inc. v. Radcliff Materials*, 451 U.S. 630 (1981); *Mobile Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978). This prohibition is particularly exacting in fields where the statutory scheme is intended to be comprehensive, and in areas which raise complex factual and regulatory issues requiring policy judgments which the courts are not equipped to make. *See, Bush v. Lucas*, 462 U.S. 367, 388-390 (1983); *Texas Industries, Inc.*, 451 U.S. at 646-47; *Milwaukee*, 451 U.S. at 317-19. The opinion below clearly contravenes this prohibition, and does so in a way which brings it into conflict with the text of § 1823(e) and *Langley*'s interpretation of that text. This Court

should grant this Petition in order to eliminate the resulting conflict and enforce its prior pronouncements relating to the substantive and institutional limits of federal common law.

C. The Novel Rule of Federal Common Law Promulgated by the Court Below is Also Inconsistent With the Rationale and Rule of D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942).

In *D'Oench, Duhme & Co.*, this Court held, as a matter of federal common law, that a bank customer was estopped from offering a "secret agreement" in defense of a collection action brought by the FDIC following its acquisition of an asset in a transaction similar to the purchase and assumption transaction at issue in this case. 315 U.S. at 459-60. In reaching this conclusion, the Court stressed FDIC's need to be able to rely on its examination of the assets of insured banks. *Id.*, at 457, 460. Thus, one who "len[ds] himself to a scheme or arrangement whereby the banking authority . . . [is] likely to be misled" must be precluded from relying on that "scheme or arrangement" in defense of a subsequent enforcement action. *Id.* at 460. Of course, a rule of estoppel predicated on the likely misleading effect of undisclosed arrangements assumes that regulators will in fact undertake detailed evaluations of bank assets: "Plainly one who gives such a note to a bank with a secret agreement that it will not be enforced must be presumed to know that it will conceal the truth from the *vigilant eyes* of the bank examiners." *Id.* (emphasis supplied). Thus, like § 1823(e), the *D'Oench, Duhme* doctrine not only assumes the occurrence of detailed asset review, but is designed to enable such evaluations to occur quickly in cases involving failing or failed institutions. *Castleglen, Inc. v. Commonwealth Savings Ass'n.*, 728 F. Supp. 656, 663 (D. Utah 1990).

The *D'Oench, Duhme* doctrine is entirely consistent with state law and the principle of freedom of contract. *Id.*, at 456 and 461. Justice Jackson emphasized this point in his oft-cited concurring opinion:

> I hardly suppose that Congress intended to set us completely adrift from state law with regard to all questions as to which it is not provided a statutory answer. . . . *No doubt many questions as to the liability of parties to commercial paper which comes into the hands of the Corporation will best be solved by applying the local law with reference to which the makers and the insured bank presumably contracted. The Corporation would succeed only to the rights which the bank itself acquired where ordinary and good-faith commercial transactions are involved. Id.*, at 473-74 (emphasis supplied)

Like § 1823(e), *D'Oench, Duhme* therefore contemplates the enforceability of defenses arising from the text of a disclosed agreement, at least in cases where "ordinary and good faith commercial transactions are involved."[21] Such agreements cannot "conceal the truth from the vigilant eyes of the bank examiners"[22], cannot create an estoppel, and should therefore be enforced according to their terms, since the Congress did not intend to displace rights acquired through "ordinary and good faith commercial transactions". *Id.*, at 460; *id.* at 474

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21 *Howell v. Continental Credit Corp.*, 655 F.2d 743, 746 (7th Cir. 1981) (§ 1823(e) codifies the rationale and rule of *D'Oench, Duhme*); *accord, FDIC v. Blue Rock Shopping Center, Inc.*, 766 F.2d 744, 753 n. 26 (3rd Cir. 1985); *FDIC v. Rivera-Arroyo,* 645 F. Supp. 511, 521 (D. P.R. 1986) ("The Court in *D'Oench* did not seek to infuse rights not included [in the terms of the acquired asset]. Its ruling was aimed at preventing secret agreements which could pass undetected by the FDIC in its expeditious asset gathering and collecting activities.").

22 "If . . . the records of a bank evidence all the obligations of the bank, the regulating authority will not be deceived." *FSLIC v. Two Rivers Associates, Inc.*, 880 F.2d 1267, 1275 (11th Cir. 1989).

(Jackson, J., concurring). Thus, as is the case with its statutory successor, the rule of *D'Oench, Duhme* recognizes the enforceability of good faith contracts established under state law,[23] provided those contracts are adequately evidenced in the records of the bank.

The transfer restraint attendant to the letter at issue in this case is such a contract. As pointed out by the dissent, the restraint can hardly be characterized as a "secret agreement" which "would tend to deceive the banking authorities." *Langley*, 484 U.S. at 92 (citing *D'Oench, Duhme*, 351 U.S. at

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23 As a federal common law case, *D'Oench, Duhme* does not stand alone in its deference to state law and private agreement. *See, e.g., United States. v. Kimball Foods, Inc.*, 440 U.S. 715 (1979). In addition, federal courts have often looked to the Uniform Commercial Code as a source of federal law. *See, e.g., United States v. Burnette-Carter Co.*, 575 F.2d 587, 590 (6th Cir. 1978), *cert. denied*, 439 U.S. 996 (1978); *Mitchell v. Shepherd Mall State Bank*, 458 F.2d 700, 703 n. 1 (10th Cir. 1972); *United States v. Hext*, 444 F.2d 804 (5th Cir. 1971); *See, also, Aaronson v. Quick Point Pencil Co.*, 440 U.S. 257, 263 (1979) ("commercial agreements traditionally are the domain of state law").

The question which arises whenever a court must consider the adoption of federal common law is whether state law provides a "feasible route" for achievement of the federal purpose. *Wallis*, 384 U.S. at 70. Such a "feasible route" clearly exists in this case. Both state law and the party's contract permits the beneficiary to assign the right to proceeds under the letter. C.R.S. § 4-5-116(2), (3). On the other hand, nothing in the Act requires FDIC, as receiver, to sell "unacceptable" assets to FDIC Corporate. In fact, 12 U.S.C. § 1823(d) expressly permits the receiver to offer assets of the failed bank "as security for loans from the Corporation . . . in accordance with the express provisions of State law", and expressly permits the "Corporation . . . [to] make loans on the security of . . . the assets of an insured bank." *See, also*, 12 U.S.C. § 1823(c)(2)(A). Thus, the federal objective (realizing the letter's value as an "unacceptable" asset) can easily be achieved, in a manner consistent with state law and the party's agreement, through an assignment of the right to proceeds as security for a loan to the receiver from FDIC Corporate. Indeed, the asset at issue in *D'Oench, Duhme* was acquired by FDIC as collateral for a loan. 315 U.S. at 454.

460); *FDIC II*, 911 F.2d at 1479 (Baldock, J., dissenting). On the contrary, the letter states on its face that it is subject to the UCP (which provides in no uncertain terms that a letter can be transferred only if it is expressly designated as transferable), and, as mentioned previously, the Uniform Commercial Code enacted in all 50 states prohibits transfer absent an express designation to the contrary. 2A Uniform Laws Ann. § 5-116 (Master ed. 1977 & 1990 Pamp.). The FDIC is presumed to be expert in its field of operation, *see*, e.g., *Investment Co. Institute v. FDIC*, 815 F.2d, 1540, 1550 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 847 (1987), and is clearly aware of the universal and longstanding law and custom regarding transferability of letters of credit.[24] Moreover, it can hardly be

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24 While it does not find the letter's transfer restraint to be "deceptive", the court below suggests that discovery of such a restraint would impose "an enormous administrative burden" on FDIC, which, in the context of a purchase and assumption transaction, would rise to "the impossible", and therefore, would effectively "foreclose" the purchase and assumption option. *FDIC II*, 911 F.2d at 1474-75. The factual and legal inconsistencies arising from this "parade of horribles" have previously been discussed. However, in addition, it should be noted that the court fails to explain how an asset backed by a letter of credit issued by a solvent bank, which, under ordinary circumstances, would be of the highest banking quality, J. Dolan, *The Law of Letters and Credit*, ¶ 1.01(3) (1984), was classified by FDIC as "unacceptable". Cf. *FDIC II*, 911 F.2d at 1478 n. 3 (Baldock, J. dissenting). Although the record is far from complete, it appears that this classification occurred because FDIC knew of the transfer restraint, and that, consequently, "the impossible" happened in this case. *See, United States v. Kimball Foods, Inc.*, 440 U.S. at 729-32 (agency's operating practices belie assertion that federal rule is needed to avoid administrative burden.). Second, if the court is to be taken at its word, one must assume that FDIC personnel are unaware of the well established and uniform law applicable to letters of credit, that such personnel have no detailed knowledge concerning an insured bank's assets notwithstanding their examinations of the bank, and that FDIC is generally unaware of the type of assets which it controls as the bank's receiver, even while it negotiates the sale of those assets. Regardless of the factual validity of such assumptions, they can hardly promote and maintain confidence in the nation's banking system. *See, FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 432-35 (1986).

argued that the letter resulted from anything other than an "ordinary and good-faith commercial transaction". *See, D'Oench, Duhme*, 315 U.S. at 474 (Jackson, J. concurring). Consequently, the majority's resort of federal common law to deny enforcement of the transfer restraint is flatly inconsistent with both the rationale and rule of *D'Oench, Duhme.*

III. SUMMARY

The opinion below intends to reaffirm and bolster FDIC's administrative authority. It attempts to do this by granting FDIC the power to ignore state law and contractual restraints on transfer. However, in its rush to this conclusion, the court below has exceeded its institutional role by ignoring fundamental precepts of statutory interpretation, and by ignoring equally fundamental constraints on its lawmaking power. The net result is an ungrounded opinion which creates serious statutory, decisional and state-federal conflicts in an area of the law which, prior to this time, was uniform, well settled and well understood. The resulting commercial and transactional uncertainties are difficult to predict, but potentially enormous. More importantly, the ultimate effect of the opinion may well be to destabilize FDIC's administrative authority by calling into question the factual and conceptual underpinnings of 12 U.S.C. § 1823(e), *Langley* and *D'Oench, Duhme.*

WHEREFORE, this Petition for Writ of Certiorari is respectfully submitted this 17th day of November, 1990.

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APPENDIX A

FEDERAL DEPOSIT INSURANCE CORPORATION, A UNITED STATES CORPORATION,

Plaintiff-Appellant,

v.

BANK OF BOULDER, A COLORADO CORPORATION,

Defendant-Appellee.

No. 86-1071.

United States Court of Appeals, Tenth Circuit.

Aug. 20, 1990.

Before HOLLOWAY, Chief Judge, McKAY, LOGAN, SEYMOUR, ANDERSON, TACHA, BALDOCK, and BRORBY, Circuit Judges.

McKAY, Circuit Judge.

This case involves an action by the Federal Deposit Insurance Corporation (FDIC) seeking to enforce a letter of credit issued by the defendant Bank of Boulder.

I. Facts

On June 30, 1982, the Bank of Boulder issued a standby letter of credit to Dominion Bank of Denver in the amount of $27,000. On September 30, 1983, Dominion Bank of Denver was declared insolvent and ordered closed by the Colorado State Banking Commissioner pursuant to Colo. Rev. Stat. § 11-5-102 (1973 & Supp. 1989). The Commissioner then tendered to FDIC an appointment as liquidator of Dominion Bank of Denver pursuant to Colo. Rev. Stat. § 11-5-105 (1973

& Supp. 1989). FDIC accepted this appointment pursuant to 12 U.S.C. § (e) (1988).

In furtherance of its role as receiver/liquidator of the bank, FDIC consummated a Purchase and Assumption (P & A) transaction pursuant to authority granted by 12 U.S.C. § 1823(c)(2)(A) (1988). This P & A transaction allowed certain assets of the failed bank to be sold to a healthy bank and other assets, including the Dominion Bank letter of credit, to be transferred by FDIC as Receiver (FDIC/Receiver) to the FDIC in its corporate capacity (FDIC/Corporation). The assuming bank essentially purchased only those assets in which it was interested and assumed all of the liabilities of Dominion Bank. FDIC/Corporation purchased the remaining assets of the failed Dominion Bank and provided the funds with which FDIC/Receiver paid the assuming bank for the difference between the assets it purchased and the liabilities it assumed. As required, the entire P & A transaction received the approval of the District Court for the City and County of Denver.

On October 5, 1984, FDIC/Corporation attempted to draw on the letter of credit that it had acquired during the P & A transaction. However, Bank of Boulder twice refused to honor the demand for payment. On March 18, 1985, the FDIC brought suit against Bank of Boulder in order to obtain payment on the letter of credit. On April 10, 1985, Bank of Boulder filed a motion to dismiss which was granted by the district court. *FDIC v. Bank of Boulder,* 622 F.Supp. 288 (D.Colo. 1985). The district court concluded that the letter of credit could not legally be transferred to FDIC/Corporation; and, thus, there was no federal jurisdiction for the claim. *Id.* at 290.

FDIC/Corporation then filed an appeal of the district court's decision in this court. The panel that heard the appeal reversed the district court's decision, though a dissent was filed. The majority concluded that federal common law

allowed the transfer of the letter of credit to FDIC/Corporation. *FDIC v. Bank of Boulder,* 865 F.2d 1134 (10th Cir. 1988). Bank of Boulder then filed a petition for rehearing and a suggestion for rehearing en banc. The en banc court voted to grant the suggestion for rehearing en banc.

The only issue now before the en banc court is whether FDIC/Corporation can purchase a letter of credit from FDIC/Receiver in the course of a P & A transaction, notwithstanding that the letter is nontransferable under state law. After full briefing by both parties and oral argument before the en banc court, we have determined that the original panel majority was correct and that the decision of the district court must be reversed.

II. Standard of Review

[1] The question of whether FDIC/Corporation has the authority to purchase a letter of credit in the course of a P & A transaction is a question of law. We review questions of law de novo. *In re Ruti-Sweetwater, Inc.,* 836 F.2d 1263, 1266 (10th Cir. 1988). Thus, we are not constrained by the conclusions of the trial court; we are required to review the record in light of our own independent judgment. *State Distrib., Inc. v. Glenmore Distilleries,* 738 F.2d 405, 412 (10th Cir. 1984); *Ocelot Oil Corp. v. Sparrow Indus.,* 847 F.2d 1458, 1464 (10th Cir. 1988).

III. The Mechanics of a Purchase and Assumption Transaction

When a state agency declares a bank insolvent and appoints the FDIC as receiver, FDIC/Receiver may choose among several alternative ways to either liquidate the bank or sell the bank to another bank as a going concern. The two major alternatives include a straight liquidation, in which FDIC simply sells the assets of the bank and pays off the

depositors of the bank from the proceeds and from the FDIC insurance fund, and a P & A transaction, in which an assuming bank purchases most of the failed bank's assets and continues to operate the bank as a going concern. Liquidation has several bad effects on the banking community, as the result of the closure of the bank. Depositors lose confidence in the specific failed bank. The public in general loses confidence in the entire banking community. Liquidation also generally involves a major loss to the FDIC's insurance fund. Thus, liquidation is not the favored alternative.

[2] The other major alternative, the purchase and assumption transaction,[1] involves three parties: the receiver, the assuming bank, and FDIC as insurer. When FDIC is appointed receiver, it simultaneously acts as the receiver of

1 Bank of Boulder and amicus curiae suggest that there are many other alternatives available to FDIC when it is appointed receiver of an insolvent bank. Bank and amicus claim that under these alternatives FDIC/Corporation would not be required to purchase any assets. While it is true that these alternatives are available, we need only point out that FDIC is given sole discretion to determine what method it will use to structure failed bank assistance transactions. 12 U.S.C. § 1823(c)(2)(A) (1988); *see Super X Drugs Corp. v. FDIC*, 862 F.2d 1252, 1255 (6th Cir. 1988).

In addition, the suggested alternatives merely create a different, although similar, problem. For example, Bank suggests that FDIC/Receiver could transfer all of the failed bank's assets to the assuming bank, while FDIC/Corporation provided the needed funds to balance the difference between the assets received and the liabilities assumed. The problem with this suggestion is that it would require FDIC/Receiver to transfer any letter of credit it acquired as receiver to the assuming bank. Assuming the letter of credit is nontransferable, this scenario presents a very similar problem to the transfer of a letter of credit to FDIC/Corporation. Finally, we note that there will be times that FDIC will determine in its sole discretion that a P & A transaction is appropriate. In fact, the P & A is used by FDIC more often—by far—than any other alternative. For calendar years 1984 through 1988, 544 of the 719 commercial bank failures—or 76 percent—were handled through P & A transactions. *See FDIC Ann. Rep.* (1984-1988).

the failed bank and as the insurer of the deposits. *See FDIC v. All Souls Episcopal Church,* 769 F.2d 658, 662 (10th Cir.1985), *cert. denied,* 475 U.S. 1010, 106 S.Ct. 1184, 89 L.Ed.2d 300 (1986); *FDIC v. Leach,* 772 F.2d 1262, 1264 (6th Cir.1985); *Gunter v. Hutcheson,* 674 F.2d 862, 865 (11th Cir.), *cert. denied,* 459 U.S. 826, 103 S.Ct. 60, 74 L.Ed.2d 63 (1982), *overruled on other grounds, Langley v. FDIC,* 484 U.S. 86, 108 S.Ct. 396, 98 L.Ed.2d 340 (1987); *FDIC v. Ashley,* 585 F.2d 157, 160 (6th Cir.1978); *FDIC v. Godshall,* 558 F.2d 220, 222 n. 4 (4th Cir.1977); *Freeling v. Sebring,* 296 F.2d 244, 245 (10th Cir.1961); *FDIC v. Hudson,* 643 F.Supp. 496, 498 (D.Kan.1986). When a state bank fails and FDIC is tendered the appointment as receiver, it is statutorily obligated to accept the appointment. *See* 12 U.S.C. § 1821(e) (1986). Thus, FDIC cannot avoid acting in two capacities in a P & A transaction.

In a P & A transaction, the assuming bank buys the assets of the failed bank that are of the highest banking quality. The assuming bank also assumes the deposit liabilities of the failed bank. As a result, the amount of deposit liabilities that the bank assumes is greater than the value of the assets it purchases. In order to make the purchase of the failed bank attractive to the assuming bank, FDIC/Receiver pays cash to the assuming bank in an amount sufficient to cause the assets the bank purchases to be equal to the liabilities it assumes, less some credit for the going concern value of the failed bank. The cash paid by FDIC/Receiver to the assuming bank is paid from FDIC/Corporation's insurance fund. In consideration for these funds, FDIC/Corporation acquires the assets of the failed bank that are not transferred to the assuming bank. FDIC/Corporation's "purchase" of the nontransferred assets is authorized by 12 U.S.C. § 1823(c)(2)(A) (1988). FDIC/Receiver is authorized to offer the assets of the failed bank for sale to FDIC/Corporation by 12 U.S.C. § 1823(d) (1988). Ultimately, then, FDIC/Corporation finances the P & A transaction by providing the funds with which

FDIC/Receiver pays the assuming bank. *Cf. Langley v. FDIC*, 484 U.S. 86, 108 S.Ct. 396, 401, 98 L.Ed.2d 340 (1987).

[3] After FDIC/Corporation acquires the nontransferred assets in the P & A, it attempts to enforce and liquidate these assets to recoup its cash outlay and thereby minimize the loss to the insurance fund. In so doing, FDIC/Corporation may bring actions and prosecute claims in its own right. *See FDIC v. Braemoor Assoc.*, 686 F.2d 550, 552 (7th Cir.1982); *FDIC v. Ashley*, 585 F.2d 157, 159-64 (6th Cir.1978); *FDIC v. Godshall*, 558 F.2d 220, 222-23 (4th Cir.1977); *Hudson*, 643 F.Supp. 496, 497 (D.Kan.1986).

In order for a P & A to be implemented by FDIC, the P & A must be less costly than the other major alternative of liquidating the failed bank.[2] 12 U.S.C. § 1823(c)(4)(A) (1988). Making the determination of whether a P & A would be less expensive than a simple liquidation requires a quick review of the failed bank's books and records. This review of assets must be quick—usually overnight—because a P & A transaction requires the bank to reopen quickly in order to maintain the going concern value of the failed bank. *Langley*, 108 S.Ct. at 401.[3]

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2 A P & A may also be approved in the extraordinary case when the FDIC determines that the continued operation of an insured bank is "essential to provide adequate banking services in [the] community." 12 U.S.C. § 1823(c)(4)(A) (1988); *see FDIC v. Wood*, 758 F.2d 156, 161 (6th Cir.1985).

3 Bank of Boulder and amicus curiae argue that P & A transactions do not occur overnight. They claim that FDIC closely observes banks, particularly failing banks, for long periods of time prior to any failure. Thus, the argument continues, FDIC is familiar with the assets of all failing banks prior to the actual P & A transaction; and a close review of assets is not required the night before the transaction takes place. Bank and amicus curiae cite a book written by a former FDIC director to support their claim.

(footnote continues)

In this case FDIC chose to proceed through the mechanism of a P & A transaction. As a result of this transaction, FDIC/Corporation acquired the letter of credit from the failed bank. We believe that the transfer of this letter of credit to FDIC/Corporation must be upheld for two independent reasons. We hold that both the federal statutory law and the federal common law allow the transfer of the letter of credit to FDIC/Corporation.

IV. Federal Jurisdiction

The district court dismissed the instant case on two grounds. First, it concluded that the letter of credit could not be transferred to FDIC/Corporation; therefore, FDIC/Corporation could not sue to enforce the letter of credit. Second, the district court found that if it was FDIC/Receiver that brought suit on the letter of credit, there was no federal subject matter jurisdiction. We reverse only the first finding. However, because we hold that a letter of

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(footnote continued)

Conversely, FDIC points out that every court, including the United States Supreme Court, that has considered the time frame issue has concluded that such transactions are done at a quick enough pace that a detailed review of assets is not possible. *See Langley*, 108 S.Ct. at 401; *FDIC v. Leach*, 772 F.2d 1262, 1264 (6th Cir.1985); *FDIC v. Merchants Nat'l Bank of Mobile*, 725 F.2d 634, 638 (11th Cir.1984); *Gunter v. Hutcheson*, 674 F.2d 862, 865 (11th Cir.1982); *FDIC v. Sarvis*, 697 F.Supp. 1161, 1164 (D.Colo. 1988); *FDIC v. Ritchie*, 646 F.Supp. 1581, 1583 (D.Neb.1986); *FDIC v. National Union Fire Ins. Co.*, 630 F.Supp. 1149, 1154 (W.D.La.1986). We are inclined to agree with these courts, and with the current FDIC, that P & A transactions must be completed with extraordinary speed. When a bank fails, FDIC must make the decision whether to reopen the bank through a P & A transaction very quickly. If the bank is closed for virtually any amount of time, the going concern value of the bank is dramatically decreased. Even if FDIC has some familiarity with the assets of these banks, we believe that the nature of the P & A transaction does not allow careful review of assets prior to the failure of the bank.

credit can be transferred to FDIC/Corporation, we also hold that federal subject matter jurisdiction exists in this case.

[4] Under 12 U.S.C. § 1819 (Fourth) (1988), Congress specifically granted the FDIC the following powers:

> To sue and be sued, complain and defend, in any court of law or equity, State or Federal. All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof. . . .

Thus, we hold that Congress has provided federal subject matter jurisdiction for cases involving the FDIC. Two circuit courts have found this grant of jurisdiction to be very expansive, indicating Congress' desire that cases involving FDIC should generally be heard and decided by the federal courts. *See FDIC v. Nichols*, 885 F.2d 633, 636 (9th Cir.1989); *FDIC v. Sumner Financial Corp.*, 602 F.2d 670, 678 (5th Cir.1979).

[5] Section 1819 (Fourth) also contains an exception to this general grant of federal jurisdiction over FDIC cases. Jurisdiction is vested "except that any suit to which the Corporation is a party in its capacity as receiver of a State bank and which involves only the rights or obligations of depositors, creditors, stockholders and such State bank under State law shall not be deemed to arise under the laws of the United States." 12 U.S.C. § 1819 (Fourth) (1988). The Sixth Circuit has held that in order for this exception to apply three conditions must be met: "First, the FDIC must be a party to 'such suit' in its capacity as a receiver of a state bank. . . . Second, the suit must involve only the rights or obligations of depositors, creditors, stockholders, and the state bank itself. . . . Third, the suit must involve such rights or obligations under state law." *In re Southern Indus. Banking Corp.*, 872 F.2d 1257, 1260 (6th Cir.1989); *see also, Nichols*, 885

F.2d at 636. We agree with the Sixth Circuit's holding and adopt its three-part test.

[6] To resolve this case, we need go no further than the first requirement. We hold that the transfer to FDIC/Corporation was valid. Thus, FDIC/Corporation, not FDIC/Receiver, brought this suit and the first prong of the exception is not fulfilled. *Cf. Nichols*, 885 F.2d at 636-37. Consequently, federal jurisdiction exists for this suit.

Bank of Boulder argues that it was actually FDIC/Receiver that brought suit to enforce the letter of credit. We simply note that this contention is inconsistent with the Bank's position that FDIC/Receiver would be entitled to draft on the letter of credit. Bank of Boulder rejected FDIC's drafts on the letter, presumably because the Bank thought that FDIC was acting in its corporate capacity. If FDIC/Receiver actually submitted the draft to the Bank, then Bank should have honored the draft. Since Bank did not honor the draft, we must assume that FDIC/Corporation presented the draft on the letter. Thus, FDIC/Corporation is the party now seeking enforcement of the letter. Because we hold that FDIC/Corporation is the entity suing to enforce the letter, we also hold that federal subject matter jurisdiction exists.

V. Federal Statutory Law

Colorado law specifically provides that a letter of credit is not normally assignable. "The right to draw under a credit can be transferred or assigned only when the credit is expressly designated as transferable or assignable." Colo.Rev.Stat. § 4-5-116(1) (1973). However, it is uncontested that notwithstanding this provision, FDIC/Receiver may validly obtain possession of a letter of credit from a failed bank by operation of law. In fact, Colorado law provides that when the FDIC accepts appointment as liquidator

of a failed bank, the state banking commissioner shall file a certificate evidencing the appointment and "the possession of all the assets, business, and property of such bank of every kind and nature, wheresoever situated, shall be deemed transferred from such bank and the commissioner to the federal deposit insurance corporation or its successor." Colo.Rev.Stat. § 11-5-105(3) (Supp.1989). This provision is consistent with the long-recognized principle that anti-assignment provisions do not bar the passing of claims by operation of law. *United States v. Aetna Casualty & Surety Co.*, 338 U.S. 366, 374, 70 S.Ct. 207, 212, 94 L.Ed. 171 (1949). Thus, it is undisputed that FDIC/Receiver could enforce the letter of credit.

Because it was FDIC/Corporation that attempted to enforce the letter of credit, however, the question presented by this appeal is whether FDIC/Receiver can transfer its rights under the letter of credit to FDIC/Corporation. Initially we note that Colorado law could be interpreted specifically to provide for such a transfer by statute. The Colorado statute immediately following the section that allows FDIC/Receiver to become liquidator of a failed bank states: "[A]ll or any part of the assets of [a failed bank] may be sold to the corporation by the . . . liquidator. . . . " Colo.Rev.Stat. § 11-5-106(1) (Supp.1989). It is at least arguable that this provision creates the power in FDIC/Receiver—as liquidator—to transfer all of the assets of a failed bank to FDIC/Corporation. However, we choose not to base our decision on this ground. We believe that to overcome the clear prohibition against the transfer of letters of credit, the Colorado legislature must state more clearly that FDIC/Receiver has the power to transfer otherwise nontransferable assets to FDIC/Corporation. We note, however, that Colorado law is far from clear on this issue.

[7, 8] Ultimately, we conclude that Colorado's general restriction on the transfer of letters of credit is preempted by

federal law in the case of a transfer from FDIC/Receiver to FDIC/Corporation in the course of a P & A. With regard to preemption, the Supreme Court has stated:

> [W]here Congress has not entirely displaced state regulation in a specific area, state law is pre-empted to the extent that it actually conflicts with federal law. Such a conflict arises when . . . state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Pacific Gas & Elec. v. State Energy Resources Conserv. & Dev. Comm'n, 461 U.S. 190, 204, 103 S.Ct. 1713, 1722, 75 L.Ed.2d 752 (1983). Here, the federal statute controlling FDIC states:

> In order to facilitate a merger or consolidation of an insured bank . . . with an insured institution or the sale of assets of such insured bank and the assumption of such insured bank's liabilities by an insured institution, or the acquisition of the stock of such insured bank, the Corporation is authorized, in its sole discretion and upon such terms and conditions as the Board of Directors may prescribe—(i) to purchase any such assets or assume any such liabilities . . . .

12 U.S.C. § 1823(c)(2)(A) (1988). This statute clearly gives FDIC/Corporation the authority to purchase "any assets" of a failed bank in order to facilitate the purchase of a failed bank by an assuming bank. The language of the statute is *not* limited to any *transferable* assets. Thus, we hold that section 1823(c)(2)(A) creates a power in FDIC/Corporation to purchase any assets, including assets nontransferable under state law, from FDIC/Receiver in order to facilitate a P & A transaction. Consequently, we hold that this statute preempts any Colorado restriction on the transferability of letters of

credit from FDIC/Receiver to FDIC/Corporation in the course of a P & A.

Bank of Boulder argues that the above holding ignores the fact that section 1823 does not grant FDIC/Receiver the authority to sell the assets to FDIC/Corporation. We find this argument particularly weak when we consider the language of Colo.Rev.Stat. § 11-5-106(1) which grants FDIC/Receiver the authority to sell any assets of a failed bank to FDIC/Corporation. "[A]ll or any part of the assets of [a failed bank] may be sold to the corporation by the [FDIC/Receiver as liquidator]." Colo.Rev.Stat. § 11-5-106(1) (Supp.1989). FDIC/Receiver is also granted the power "to offer the assets of [failed] banks for sale to the Corporation. . . . " 12 U.S.C. § 1823(d) (1988).

Bank of Boulder's argument identifies Bank's fundamental misunderstanding of the nature of P & A transactions. P & A transactions do not consist of two independent purchases and sales. Instead, P & A transactions are made up of two very intertwined purchases and sales. FDIC/Receiver sells the highest quality assets to the assuming bank. The assuming bank in turn agrees to assume all of the failed bank's liabilities. However, in order for the assuming bank to be willing to take on all of these liabilities, FDIC/Receiver must provide the difference in cash between the assets purchased and the liabilities assumed—less an amount for the going concern value of the bank. The difference in cash comes from FDIC/Corporation. As a result, the entire transaction is financed by FDIC/Corporation. There would be no P & A if FDIC/Corporation did not provide the extra cash. In return for this cash outlay, FDIC/Corporation is entitled to the remaining assets of the failed bank. Thus, although there are actually two purchases and sales in a P & A, they are so intertwined that one could not occur without the other.

Several federal cases support our holding that the federal FDIC statute authorizes the transfer of

assets—nontransferable under state law—from FDIC/Receiver to FDIC/Corporation. *See, e.g., Chatham Ventures, Inc. v. FDIC,* 651 F.2d 355, 358 (5th Cir.1981), *cert. denied,* 456 U.S. 972, 102 S.Ct. 2234, 72 L.Ed.2d 845 (1982); *FDIC v. Rectenwall,* 97 F.Supp. 273 (N.D.Ind.1951). In *Rectenwall,* the court found that a tort claim that was nonassignable under state law could be transferred to FDIC/Corporation under the precursor statute to current section 1823.

> Whatever might be said of the adequacy of the language used, it is nonetheless apparent that the statutory scheme embodied in this section contemplates the unrestricted transferability of every asset of an insured bank, at least where necessary to accomplish the assumption of its deposit liabilities by another insured bank.

Rectenwall, 97 F.Supp. at 274. Another federal district court reached the same conclusion concerning the transferability of a tort claim under the very similar FSLIC statute. *See FSLIC v. Fielding,* 309 F.Supp. 1146, 1151 (D.Nev.1969), *cert. denied,* 400 U.S. 1009, 91 S.Ct. 567, 27 L.Ed.2d 621 (1971).

This rule of law has been consistently applied by more recent federal cases. In *FDIC v. Hudson,* 643 F.Supp. 496 (D.Kan.1986), a district court in this circuit specifically noted that "defendants claim that as receiver, the FDIC's right to bring a tort action is not assignable under Kansas law to the FDIC as a corporation. . . . [However,] federal law applies in these actions, and . . . tort law claims are assignable, although state law would not allow it". *Hudson,* 643 F.Supp. at 498. In *FDIC v. Main Hurdman,* 655 F.Supp. 259 (E.D. Cal.1987), the court held that a tort claim was assignable to

the FDIC pursuant to a rescue without reference to state law. The court pointed out:

> [T]he congressional purpose in creating the FDIC would be inhibited by application of state law strictures. Moreover, free assignability of assets from failing uninsured banks to the FDIC realistically addresses the frequent need of the FDIC to operate under emergency conditions in rescue situations. A need by the FDIC to determine assignability on an asset-by-asset basis would surely slow a rescue operation down, when dispatch was required.

Main Hurdman, 655 F.Supp. at 268. *See also FDIC v. Abraham,* 439 F.Supp. 1150, 1152 (E.D.La1977).[4]

We believe that the rule of law announced in these cases with regard to the assignability of tort claims is equally applicable to the assignability of letters of credit. The purpose of the assignment in both cases is to allow FDIC/Corporation to collect on the assigned assets in order to defray part of the losses sustained by the insurance fund. The language of the cases is universal in scope and reasoning, thus including letters of credit, particularly when discussing the need for speed in accomplishing a P & A transaction. Consequently, we hold that federal statutory law preempts contradictory state law and allows nontransferable letters of credit to be transferred from FDIC/Receiver to FDIC/Corporation in the course of bank rescue operations, including P & A transactions.

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4 Analogously, a recent Fifth Circuit case held that FDIC/Receiver has the power to transfer fiduciary appointments held by an insolvent bank to a federally-created bridge bank, and that contrary state law was preempted. *See CNB Texas Nat'l Bank v. Cowden,* 895 F.2d 1488, 1499-1501 (5th Cir.1990).

VI. Federal Common Law

[9, 10] Although we conclude that federal statutory law provides a clear answer to the issue presented by this case, we also believe that federal common law requires a uniform rule of transferability of letters of credit to FDIC/Corporation in the course of P & A transactions. We recognize that resort to federal common law is only necessary where Congress has not plainly spoken to the matter under consideration. *Milwaukee v. Illinois,* 451 U.S. 304, 313-14, 101 S.Ct. 1784, 1790-91, 68 L.Ed.2d 114 (1981). Thus, we include the following discussion of federal common law as an alternative basis for our decision. Even if our preemption analysis were not correct, we believe that it would be necessary to apply federal common law with the same result as shown hereafter.

The United States Supreme Court has enunciated a three-pronged test to determine whether a federal common law rule is needed to supersede conflicting state law. In *United States v. Kimbell Foods, Inc.,* 440 U.S 715, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979), the Supreme Court explained the three requirements for creating a federal common law rule.

> [First,] federal programs that "by their nature are and must be uniform in character throughout the Nation" necessitate formulation of controlling federal rules. . . . [Second, a]part from considerations of uniformity, we must also determine whether application of state law would frustrate specific objectives of the federal programs. If so, we must fashion special rules solicitous of those federal interests. [Third], our choice-of-law inquiry must consider the extent to which application of a federal rule would disrupt commercial relationships predicated on state law.

Kimbell Foods, 440 U.S. at 728-29, 99 S.Ct at 1458-59

We first consider the need for a nationally uniform rule allowing FDIC/Corporation to acquire nontransferable assets of failed banks in the course of P & A transactions. We are convinced that such a rule is needed. Without such a rule, FDIC/Corporation is subjected to all transfer restrictions and is faced with an enormous administrative burden in trying to determine whether or not to finance a P & A. Specifically, FDIC/Corporation would have to determine the transferability status of every asset. Because the terms of one asset differ from the terms of another, FDIC/Corporation would not be able to limit its evaluation of the failed bank's assets to a quick review of the failed bank's records. Instead, FDIC/Corporation would be forced to examine in detail the terms of every asset to determine which state law applies, whether the asset itself restricts transferability, and whether the asset refers to other laws that may impact the asset's transferability. FDIC/Corporation would then have to locate, review, and interpret all laws applicable to the asset to find every possible transfer restriction. To require FDIC/Corporation to do all this under the stringent time constraints of a P & A is asking the impossible. Hence, the option of handling bank failures through the P & A method would be foreclosed. Such a result runs directly counter to the policies behind the creation of the FDIC—promoting stability and confidence in the banking system.

The difficulty with determining, under the time constraints of a P & A, whether or not an asset is transferable is evident in this case. The letter of credit did not indicate on its face that it was nontransferable. As discussed in section V, there is some question whether Colorado law would make this letter of credit nontransferable to FDIC/Corporation, although it is clearly non-transferable to other parties. Although the letter was made subject to the UCP,[5] we fail to

5 Uniform Customs and Practice for Documentary Credits, International Chamber of Commerce Publication No. 290 (1974 Revision).

find discussion in the UCP concerning the specific situation under question—the transfer from FDIC/Receiver to FDIC/Corporation. Instead, the UCP merely contains a blanket restriction on transfer. In order to implement a P & A in this case, FDIC/Corporation would have had to determine which state law applied to the letter and then review and interpret Colorado law and the UCP. The need for expeditious implementation of the P & A suggests that the FDIC, in either of its capacities, cannot be expected to examine all the assets of a failed bank to locate all possible transfer restrictions. *See Langley,* 108 S.Ct. at 401; *Gilman v. FDIC,* 660 F.2d 688, 694-95 (6th Cir.1981); *FDIC v. Storm,* 578 F.Supp. 144, 146 (E.D.Mich.1983).

Bank of Boulder and amicus curiae claim that state and international law concerning the transferability of letters of credit is already uniform and thus no federal common law rule is needed. We agree that the general rule for transfers of letters of credit between ordinary commercial parties is clear and uniform. However, as we discussed earlier, we believe that the Colorado rules concerning transfers between FDIC/Receiver and FDIC/Corporation during a P & A are far from clear. Thus, at least Colorado law may not be uniform. Also, both parties agree that a letter of credit is "transferable" to FDIC/Receiver when it is appointed receiver for a failed bank. It is a small step to conclude that FDIC/Corporation could also enforce the letter of credit when assisting FDIC/Receiver in fulfilling its duties in the course of a P & A. Thus, we conclude that state and international laws are not clear or uniform.

A uniform rule permitting FDIC/Corporation to acquire otherwise nontransferable assets in a P & A eliminates the need for detailed examination of the failed bank's assets and of varying laws. Cost estimates can be made quickly and with greater accuracy, and P & A's can thereby be implemented with fewer risks and with the necessary speed. Because the

P & A is an extremely valuable tool, such a uniform rule furthers the obvious advantages of P & A's and the interests of the federal deposit insurance program. Indeed, the

> free assignability of assets from failing insured banks to the FDIC realistically addresses the frequent need of the FDIC to operate under emergency conditions in rescue situations. A need by the FDIC to determine assignability on an asset-by-asset basis would surely slow a rescue operation down, when dispatch was required.

Main Hurdman, 655 F.Supp. at 268. Moreover, P & A's will be more cost effective because transfer restrictions will not preclude recovery to the insurance fund.

The second issue we address under *Kimbell Foods* is whether state law transfer restrictions would frustrate the specific federal objectives of the FDIC. We hold that application of state transfer restrictions frustrates and significantly interferes with the objectives of the federal deposit insurance program. As discussed above, there are times when only a P & A transaction will serve the interests of the public, the insurance fund, the failed bank's depositors, and the failed bank's creditors. If transfer restrictions are enforced against FDIC/Corporation, it may not be able to collect on the nontransferable assets and P & A's become more expensive. In light of the congressional requirement that P & A's be less costly than liquidation, increasing the cost of P & A's could very well prevent P & A's in many cases. Elimination of P & A's as an option for FDIC/Receiver would cause a great interference in the effective performance of the FDIC's mission to stabilize the banking industry.

Furthermore, even if a P & A is estimated to be less costly than full-scale liquidation notwithstanding application of transfer restrictions, the fact that FDIC/Corporation would be forced to examine every asset in detail and review

and analyze varying laws to locate possible restrictions would delay implementation of the P & A, thereby diluting its advantages. Because speed is the essence of P & A's, FDIC/Corporation may have to forgo an exhaustive examination and enter P & A's at a substantial risk of loss to the insurance fund. Or, FDIC/Corporation may be forced to choose not to implement P & A's because a reasonably accurate cost estimate cannot be made within the limited time demand. "[D]ecisions concerning the appropriate method of dealing with a bank failure must be made with extraordinary speed. . . . Subjecting the FDIC to the additional burden of considering the impact of possibly variable state law on the rights involved could significantly impair the FDIC's ability to choose between the liquidation and [P & A] alternatives in handling a bank failure." *Gunter v. Hutcheson,* 674 F.2d 862, 869 (11th Cir.1982).

Finally, under *Kimbell Foods* we must consider whether the application of a federal rule would disrupt commercial relationships predicated on state law. We are convinced that application of a federal rule permitting FDIC/Corporation to acquire non-transferable letters of credit in the course of P & A's would not disrupt commercial relationships predicated on state law. The rule would come into effect only after an insured bank has failed. Parties cannot reasonably expect to carry on normal commercial relationships at that point, and it is doubtful that the eventuality of bank failure plays a significant role in the ordinary commercial expectations of the parties. Indeed, the potential damage to parties' expectations is far outweighed by the interference with the federal goals of stability and confidence in the national banking system that would result if FDIC/Corporation were not allowed to acquire nontransferable assets in P & A's.

Moreover, application of the rule we adopt simply means that FDIC/Corporation, not FDIC/Receiver, is entitled to enforce the terms of the letter of credit. Both parties

agree that FDIC/Receiver can enforce the letter. Because the issuer must go beyond the letter itself to honor FDIC/Receiver's demands for payment, the mere transfer of the letter to FDIC/Corporation as a part of a P & A—thus requiring the issuer to pay FDIC/Corporation rather than FDIC/Receiver—does not place a substantial burden on the issuer. This is particularly true when the true nature of FDIC/Corporation's crucial role in financing a P & A is understood. FDIC/Corporation merely assists FDIC/Receiver in its role as liquidator. Thus, a transfer to FDIC/Corporation from FDIC/Receiver is not likely to upset any reasonable commercial expectations. However, it is important to note that our holding is limited only to transfers from FDIC/Receiver to FDIC/Corporation in the course of P & A's. We do not address the effect of other transfers on the business expectations of the parties.

Finally, we note that if Colorado's transfer restrictions were enforced against FDIC/Corporation in this case, Bank of Boulder would likely receive an unexpected benefit. We assume that when the letter of credit was issued, the parties understood that if Dominion Bank went bankrupt, a receiver with the power to enforce the credit would be appointed. If FDIC/Corporation is not allowed to enforce the letter of credit while fulfilling its function of assisting FDIC/Receiver, then Bank of Boulder will be freed of its obligation to honor drafts of the receiver of Dominion Bank. Clearly, Bank of Boulder could not have had a reasonable commercial expectation based on state law that if Dominion Bank went bankrupt, Bank of Boulder would be relieved of all liability under the letter of credit.

VII. Conclusion

We hold that federal statutory law provides a clear rule concerning the transfer of letters of credit by FDIC/Receiver to FDIC/Corporation during rescues of failed banks. Letters

of credit—nontransferable under state law—must be transferable from FDIC/Receiver to FDIC/Corporation during the course of P & A's. In addition, we hold in the alternative that even if federal statutory law does not provide a clear answer to the transfer issue, federal common law requires a uniform federal rule allowing the transfer of letters of credit from FDIC/Receiver to FDIC/Corporation in the course of a P & A. We also hold that in this case it was FDIC/Corporation which sought to enforce the letter of credit that was validly transferred to it from FDIC/Receiver. Thus, federal subject matter jurisdiction exists for this suit.

The decision of the district court that this letter of credit could not be transferred by FDIC/Receiver to FDIC/Corporation is REVERSED.

LOGAN, Circuit Judge, concurring:

I agree with the majority's ultimate conclusion, but I do not think that it requires resort to either federal statutory preemption or federal common law. The federal statute, 12 U.S.C. § 1823(c)(2)(A), seems clearly to permit the transfer to FDIC/Corporation of *any* assets of a failed bank taken over by FDIC/Receiver. The Colorado statutory scheme seems clearly to contemplate the identical result. *See* Colo.Rev.Stat. §§ 11-5-105 to 106. Thus I do not believe that this is a case in which "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *See* majority opinion, *supra,* at 1472 (quoting *Pacific Gas & Elec. v. State Energy Resources Conserv. & Dev. Comm'n,* 461 U.S. 190, 204, 103 S.Ct. 1713, 1722, 75 L.Ed.2d 752 (1983)).

BALDOCK, Circuit Judge, with whom TACHA and BRORBY, Circuit Judges, join, concurring in part and dissenting in part.

I concur in the court's decision that Colo.Rev.Stat. § 11-5-106(1)[6] (Supp.1989) does not operate to make this letter of credit (documentary credit) assignable from FDIC-receiver to FDIC-corporation given the express provision against such assignment contained in the UCP and Colo.Rev.Stat. § 4-5-116(1)[7] (1974). The two statutes speak to different subjects, and do not conflict if § 11-5-106(1) is read as a rule of administration rather than a substantive rule of property controlling the assignment of bank assets. *See Moran v. Curistrom*, 775 P.2d 1176, 1182-83 (Colo.1989) (court should harmonize potentially conflicting statutes whenever possible so as to give effect to each statute). Even if the potential conflict between § 11-5-106(1) and § 4-5-116(1) was viewed as irreconcilable, § 4-5-116(1) concerning assignment of letters of credit would prevail because it is the later and more particular enactment.

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6 Colo.Rev.Stat. § 11-5-106 (Supp.1989) provides in part:

> **Assets sold or pledged as security.** (1) With respect to any banking institution closed on account of inability to meet the demands of its depositors or by action of the banking board or by action of its directors or in the event of its capital inadequacy or suspension, the liquidator of such institution may borrow from the federal deposit insurance corporation and furnish any part or all of the assets of said institution to said corporation as security for a loan from same, but, if said corporation is acting as such liquidator, the order of a court of record of competent jurisdiction shall be first obtained approving such loan. Upon the order of a court of record of competent jurisdiction, all or any part of the assets of such institution may be sold to the corporation by the banking board, or by the liquidator with the permission of the banking board.

1957 Colo.Sess.Laws ch. 86, § 1 at 271; *as amended by* 1 1989 Colo.Sess.Laws ch. 93, § 17 at 541.

7 Colo.Rev.Stat. § 4-5-116 (1974) provides in part:

> **Transfer and assignment.** (1) The right to draw under a credit can be transferred or assigned only when the credit is expressly designated as transferable or assignable.

This provision was enacted in 1965 when Colorado enacted the Uniform Commercial Code, including art. 5 which deals with letters of credit. *See* 1965 Colo.Sess.Laws ch. 330, § 155-5-116 at 1401.

See Public Employees Retirement Assn. v. Greens, 580 P.2d 385, 387 (Colo.1978) (when statutes conflict, later enactment controls); *Moran*, 775 P.2d at 1183 (when statutes conflict, more specific statute controls).

I also concur in the court's decision that we have jurisdiction to consider FDIC-corporation's claim under 12 U.S.C. § 1819 (Fourth) because FDIC in its corporate capacity acquired the documentary credit from itself in its capacity as receiver. "[T]he presence of an intra-FDIC transfer does not deprive the district court of subject matter jurisdiction." *See FDIC v. Nichols*, 885 F.2d 633, 636-37 (9th Cir. 1989). Thus, we have jurisdiction to consider the appeal.

I respectfully dissent, however, from the court's decision that FDIC-corporation may draw upon the documentary credit. The court decides that FDIC-corporation takes free of assignment restrictions created by state law because FDIC-corporation has the power to purchase any asset of a failed bank under 12 U.S.C. § 1823(c)(2)(A). Having decided the question before it on federal statutory preemption, the court then forges federal common law. However, when a federal statute provides the answer, we are without authority to supplement the field with federal common law. *See City of Milwaukee v. Illinois*, 451 U.S. 304, 312-14, 101 S.Ct. 1784, 1789-91, 68 L.Ed.2d 114 (1981); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625, 98 S.Ct. 2010, 2015, 56 L.Ed.2d 581 (1978). The court's approach is in marked contrast with courts which have developed federal common law to allow the FDIC to prevail; other courts have done so only when federal statutory preemption was not an available ground. *See, e.g., FDIC v. Leach*, 772 F.2d 1262, 1268 (6th Cir.) (12 U.S.C. § 1823(e) does not bar failure of consideration defense, but federal common law does); *FDIC v. Wood*, 758 F.2d 156, 159 (6th Cir.1985) (§ 1823(e) does not grant FDIC holder in due course status which would be unavailable under

state law, but federal common law does), *cert. denied*, 474 U.S. 944, 106 S.Ct. 308, 88 L.Ed.2d 286 (1985).

What drives the court's opinion is the notion that the FDIC undertakes purchase and assumption transactions in a fire-drill atmosphere and cannot be expected to review or abide by state law restrictions concerning the assignment of letters of credit.[8] To be sure, the Supreme Court in *Langley v. FDIC*, 484 U.S. 86, 108 S.Ct. 396, 96 L.Ed.2d 340 (1987), has indicated that in such transactions the evaluation of a failed bank's assets "must be made 'with great speed, usually overnight, in order to preserve the going concern value of the failed bank and avoid an interruption in banking services.' " *Id.* at 91, 108 S.Ct. at 401 (quoting *Gunter v. Hutcheson*, 674 F.2d 862, 865 (11th Cir.), *cert. denied*, 459 U.S. 826, 103 S.Ct. 60, 74 L.Ed.2d 63 (1982)). But this language should be read in the context of *Langley's* holding that 12 U.S.C. § 1823(e)[9] bars a defense of "fraud in the inducement even

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8 As a factual matter, the note backed by the documentary credit was contained in the failing bank's records; no snap decision on the part of the FDIC was necessary. The FDIC decided to keep this asset (in all likelihood long before the failed bank's assets were offered for sale) well knowing that if the asset was sold to another bank, the documentary credit would be worthless to the assuming bank.

9 12 U.S. C. § 1823(e) provides:

Agreements against Interests of the Corporation. No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.

when the fraud did not take the form of an express promise."[10] *Langley,* 484 U.S. at 90, 96, 108 S.Ct. at 400. In discussing the purposes underlying 12 U.S.C. § 1823(e) the Court indicated that "[o]ne purpose of § 1823(e) is to allow federal and state bank examiners to rely on a bank's records in evaluating the worth of a bank's assets." *Langley,* 484 U.S. at 91, 108 S.Ct. at 401. The Court stated:

> The last kind of evaluation [for purchase and assumption], in particular, must be made "with great speed, usually overnight, in order to preserve the going concern value of the failed bank and avoid an interruption in banking services." *Gunter v. Hutcheson,* 674 F.2d at 865. Neither the FDIC nor state banking authorities would be able to make reliable evaluations if bank records contained seemingly unqualified notes that are in fact subject to undisclosed conditions.

Langley, 484 U.S. at 91-92, 108 S.Ct. at 401-402. The FDIC under § 1823(e) is not held to undisclosed oral conditions, even if fraudulent and known. *Langley,* 484 U.S. at 93-96, 108 S.Ct. at 402-403. Other cases have justified the result that the FDIC takes free of fraud in the inducement and other personal defenses in part because a purchase and assumption agreement must be accomplished quickly. *See Leach,* 772 F.2d at 1264, 1266-67 (FDIC takes free of personal defenses including failure of consideration and usury because FDIC is a holder in due course as a matter of federal common law);

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10 In *Langley,* the Court reaffirmed the broad protection afforded the FDIC under § 1823(e). The Court rejected a distinction, discussed in several cases, *see FDIC v. Langley,* 792 F.2d 541, 546 (5th Cir.1986), *aff'd,* 484 U.S. 86, 108 S.Ct. 396, 98 L.Ed.2d 340 (1987); *FDIC v. Hatmaker,* 756 F.2d 34, 37 (6th Cir.1985); *Gunter,* 674 F.2d at 867, that § 1823(e) only barred a defense of an oral side agreement pursuant to a contract, but not a defense that an entire contract was void due to fraud not tied to any contractual promise. *Langley,* 484 U.S. at 90-93, 108 S.Ct. at 401-402.

Wood, 758 F.2d at 160-61 (same concerning personal defense of usury); *Gunter,* 674 F.2d at 865, 868 (FDIC takes free of defense of fraud in the inducement as a matter of federal common law); *FDIC v. Merchants Nat'l Bank of Mobile,* 725 F.2d 634, 639 (11th Cir.) (FDIC takes under § 1823(e) free of claim that bank participated only in unguaranteed portion of loan), *cert. denied,* 469 U.S. 829, 105 S.Ct. 114, 83 L.Ed.2d 57 (1984).

The documentary credit in this case is not a "seemingly unqualified" asset "that [is] in fact subject to undisclosed conditions," which would escape the attention of the FDIC. *See Langley,* 484 U.S. at 92, 108 S.Ct. at 401. Nor is this a situation in which the Bank of Boulder should be precluded from asserting its defense to payment because it knowingly contributed to a misrepresentation which affected the FDIC. *See D'Oench, Duhme & Co. v. FDIC,* 315 U.S. 447, 459-61, 62 S.Ct. 676, 680-82, 86 L.Ed. 956 (1942). On its face, the letter of credit states:

> This credit is subject to the "Uniform Customs and Practices for Documentary Credits [UCP]" (1974 Revision), International Chamber of Commerce Brochure No. 290.

The 1974 UCP referenced in the letter of credit provides that: "A credit can be transferred only if it is expressly designated as 'transferable' by the issuing bank." 1974 UPC art. 46(b).

Although UCP art. 46(b) is similar to Colo.Rev.Stat. § 4-5-116(1) concerning assignment, the court never addresses the fact that the *source* of the assignment restriction in this case is not state law, but rather a private agreement which incorporated the 1974 UCP as the rule of decision. Surely the parties have the right to have the documentary credit controlled by the UCP, rather than by state law, even if the two are similar concerning assignment. *See* 2 J. White & S. Summers, *Uniform Commercial Code* § 19-3 at 16-18,

§ 19-4 at 22 ("the general principle of freedom of contract reigns in Article 5.") (1988); Colo.Rev.Stat. § 4-1-102(3) (1974) (effect of UCC provisions generally may be varied by agreement). While the FDIC has prevailed in many instances on a theory of federal preemption of state law, *see e.g., NCNB Texas Nat'l Bank v. Cowden,* 895 F.2d 1488, 1501-03 (5th Cir.1990), federal law should not be allowed to displace the private agreement between the parties.

The FDIC might benefit handsomely by allowing it to judicially and unilaterally redraft the instruments it acquires from a failed bank to avoid the acquisition of worthless assets. For example, additional collateral might be added to secure a worthless note or a better legal description of real property might be added to mortgaged real property about to be foreclosed. But no one would suggest that merely because FDIC-Corporation has the power under 18 U.S.C. § 1823(c)(2)(A) "to purchase any . . . assets" of a failed bank, it may change the express written terms of those assets so as to increase their value. Yet, that is what the court has done by ignoring the source of the assignment restriction in this case. The private provision concerning the applicability of the UCP to this documentary credit, hence the UCP restriction on assignment, has been read out of the parties' agreement.

Even assuming, *arguendo*, that the source of the assignment restriction was grounded in state law, I do not agree that a rule concerning "the assignability of tort claims is equally applicable to the assignability of letters of credit." Court's Opinion at 16. In deciding that 12 U.S.C. § 1823(c)(2)(A) allows FDIC-corporation to purchase or acquire assets free of tranferability restrictions, the court relies upon cases involving the assignability of tort actions to the FDIC against those who may have contributed to the bank's insolvency. *See FDIC v. Main Hurdman,* 655 F.Supp. 259 (E.D.Cal.1987) (tort action against accounting firm which prepared allegedly

false financial statements for borrower); *FDIC v. Hudson*, 643 F.Supp. 496 (D.Kan.1986) (tort action against bank's officers, directors and employees); *FDIC v. Abraham*, 439 F.Supp. 1150, 1153 (E.D.La.1977) (tort action against former directors; any state law prohibition on assignment not an issue); *FSLIC v. Fielding*, 309 F.Supp. 1146 (D.Nev.1969) (suit against officers, directors and others associated with savings and loan association), *cert. denied*, 400 U.S. 1009, 91 S.Ct. 567, 27 L.Ed.2d 621 (1971); *FDIC v. Rectenwall*, 97 F.Supp. 273 (N.D. Ind.1951) (tort action against cashier who allegedly paid drafts when drawer's accounts were insufficient to cover the drafts). A case cited by the court which did not involve a tort or quasi-tort action, *Chatham Ventures, Inc. v. FDIC*, 651 F.2d 355 (5th Cir.1981), *cert. denied*, 456 U.S. 972, 102 S.Ct. 2234, 72 L.Ed.2d 845 (1982), also did not involve a state law prohibition on assignment of the note in question. The court in that case specifically noted that it "need not decide what result would obtain if state law made the FDIC's rights worthless." *Id.* at 358 n. 4.

The court holds that the language in the cases concerning assignment of tort actions to the FDIC "is universal in scope and reasoning, thus including letters of credit, particularly when discussing the need for speed in a P & A transaction." Court's Opinion at 1474. Apart from obvious differences between a tort and a contract, different implications arise from the assignment of tort actions and letters of credit which should inform our judgment. The commercial usefulness of a

documentary credit depends upon the doctrines of independence[11] and strict compliance.[12] Allowing the beneficiary to assign its interest, contrary to the express terms of the credit, impairs these principles. *See* J. Dolan, *The Law of Letters of Credit* ¶ 10.03 (1984 & 1990 Supp.). An issuer will not be able to discharge its responsibility merely by determining whether the documents conform on their face with the terms of the credit. Rather, the issuer will be forced to examine the underlying transaction between the customer and the beneficiary and decide whether strict compliance with the terms of the credit should be required. This materially alters (increases) the risk the issuer has bargained for and it also diminishes the

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11 The relationship between the issuer and the beneficiary is independent of the underlying transaction between the customer and the beneficiary. 1974 UCP, General provisions and definitions c: *Colo Nat'l Bank v. Board of County Comm'rs*, 634 P.2d 32, 37 (Colo.1981).

12 An issuer must insist that the documents presented by the beneficiary strictly comply on their face with the terms of the documentary credit. The issuer will then have a limited responsibility—if the documents conform, the issuer must honor the draft; if not, the issuer must not honor the draft. Colo.Rev.Stat. § 4-5-114 (1974 & 1989 Supp.); *American Coleman v. Intrawest Bank*, 887 F.2d 1382, 1386 (10th Cir.1989) ("The duty of the issuing Bank is ministerial in nature, confined to checking the presented documents carefully against what the letter of credit requires."); *Arbest Constr. Co. v. First Nat'l Bank & Trust Co.*, 777 F.2d 581, 584-85 (10th Cir.1985). In our diversity jurisdiction, we have discussed the importance of the strict compliance principle and determined that Colorado law would retain a strict compliance test, not one based upon substantial compliance, even when the deviation between the draft and the credit is trivial or technical in nature. *American Coleman*, 887 F.2d 1385-87.

certainty associated with letters of credit.[13] *See FDIC v. Bank of Boulder*, 865 F.2d 1134, 1143-46 (10th Cir.1988) (Baldock, J., dissenting). To recognize a transfer by operation of law may be permissible even in light to these policies, but recognizing a subsequent voluntary transfer, i.e., from FDIC-receiver to FDIC-corporation, unnecessarily compromises these state-law policies which are fundamental to the commercial utility of documentary credits. *See* Colo.Rev.Stat. § 4-5-116 comment 1 (allowing beneficiary to assign credit may deprive customer of "real and intended security").

Unlike a documentary credit, a tort is not a commercial instrument which constitutes a medium of exchange. Choses in action generally do not facilitate commerce. They are not regularly exchanged. The underlying conduct giving rise to tort actions hardly will be affected if the tort is assignable. Thus, the statement in *FDIC v. Rectenwall*, 97 F.Supp. at 274, that the language of § 1823(c)(2)(A) "contemplates the unrestricted transferability of every asset of an insured bank, at least where necessary to accomplish the assumption of its deposit liabilities by another bank," simply is too broad. For example, it is unlikely that a personal service contract would be assignable. *But see NCNB Texas Nat'l Bank*, 895 F.2d at 1499-1503 (fiduciary appointments, non-transferable under Texas law, may be transferred by FDIC-receiver to federally created bridge bank under former 12 U.S.C. § 1821(i)). While tort actions for the malfeasance of bank officers and directors

13 Bankers generally know the risks involved when they issue a documentary credit. Bankers are not philanthropists, but rather charge a fee for issuing a letter of credit. That fee is a function of the risks involved. By changing the rules governing documentary credits, both state and international, and thus allowing assignment of a credit in the absence of an express designation of transferability, the court will contribute to an increased fee associated with the issuance of documentary credits to compensate for increased risk. *See* J. Dolan, *The Law of Letters of Credit* ¶ 10.03[3] (1984) (discussing risk of litigation inherent in erosion of strict compliance principle).

may be assignable as a matter of federal law, there is no requirement that federal law must supply a rule of decision at odds with uniform state law. *See United States v. Kimbell Foods*, 440 U.S. 715, 728, 99 S.Ct. 1448, 1458, 59 L.Ed.2d 711 (1979) (holding that a national rule is not needed to determine the priority of liens arising from federal lending programs); *D'Oench*, 315 U.S. at 473-74, 62 S.Ct. at 686-87 (Jackson, J., concurring) ("No doubt many questions as to the liability of parties to commercial paper which comes into the hands of the [FDIC] will best be solved by applying the local law with reference to which the makers and the insured bank presumably contracted.").

"Commercial agreements traditionally are the domain of state law." *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 263, 99 S.Ct. 1096, 1099, 59 L.Ed.2d 296 (1979). The presence of a uniform rule restricting assignment, absent an express provision, argues forcefully against a contrary federal rule for the benefit of the FDIC. The UCC provision concerning assignment is in use in all fifty states, 2A Uniform Laws Ann. § 5-116 (Master Ed.1977 & 1990 Pamp.), and the UCP is in use throughout the world. The court's opinion would be on much firmer ground if the UCP and the UCC prohibited assignment altogether, but that is not the case. Both the UCP and the UCC allow for a right to assign proceeds even when the beneficiary's right to draw upon the credit is not assignable. 1974 UCP art. 47; Colo.Rev.Stat. § 4-5-116(2) (1989 Supp.). Both the UCP and the UCC allow for assignment if the credit is expressly designated as transferable or assignable by the issuer. 1974 UCP art. 46(b); Colo.Rev.Stat. § 4-5-116(1) (1974). Thus, the UCC and the UCP provisions hardly stand as a bar to potential FDIC collection efforts; the FDIC is free to insist that its member banks only accept assignable letters of credit as security for loans. Moreover, assuming that Colorado law would recognize a transfer by operation of law to FDIC-receiver, FDIC-receiver could have assigned the proceeds to FDIC-corporate. These alternatives within the

present scheme suggest that this is hardly an unsolvable problem for the FDIC that would justify federal preemption either by statute or federal common law. Like any creditor, the FDIC wants to collect on its own terms, *United States v. Yazell*, 382 U.S. 341, 348-49, 86 S.Ct. 500, 504-05, 15 L.Ed.2d 404 (1966), but only if the UCC provision concerning assignment is a "significant threat" to the accomplishment of the FDIC's objectives would that uniform provision be preempted. *See Wallis v. Pan American Petroleum Co.*, 384 U.S. 63, 68, 86 S.Ct. 1301, 1304, 16 L.Ed.2d 369 (1966). Given the range of options which was available to the FDIC to collect on this documentary credit, the FDIC has not shown a sufficient conflict with the FDIC's objectives to warrant preemption. *See* P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *Hart and Weschsler's The Federal Courts and the Federal System* 896 (3rd ed. 1988) ("The general proposition that state law cannot contradict or impede or violate a valid federal regulatory program is easily stated. Whether under the circumstances a contradiction really exists may, however, raise difficult and subtle problems."). The national and international consistency concerning assignment of documentary credits should give us pause before adopting a rule which disrupts commercial relationships based upon established state law.

FEDERAL DEPOSIT INSURANCE CORPORATION,
A UNITED STATES CORPORATION,
Plaintiff-Appellant,
v.
BANK OF BOULDER, A COLORADO CORPORATION,
Defendant-Appellee.

No. 86-1071.
United States Court of Appeals,
Tenth Circuit.
Sept. 28, 1988.

Before McKAY, McWILLIAMS, and BALDOCK, Circuit Judges.

I.

McKAY, Circuit Judge.

On June 30, 1982, Bank of Boulder issued a standby letter of credit in the amount of $27,000.00 to Dominion Bank of Denver, a state-chartered commercial bank with deposits insured by the Federal Deposit Insurance Corporation (FDIC). On September 30, 1983, Dominion Bank was declared insolvent and ordered closed by the Colorado State Banking Commissioner pursuant to Colo.Rev.Stat. § 11-5-102 (1973). Receivership of Dominion Bank was tendered to and accepted by FDIC in accordance with Colo.Rev.Stat. § 11-5-105 (1973) and 12 U.S.C. § 1821(e) (1982). Also on that day, after obtaining court approval, FDIC as receiver (FDIC/Receiver) entered into a Purchase and Assumption transaction (P & A) whereby it sold Dominion Bank to an

assuming bank. The assuming bank purchased the "acceptable" assets and assumed the liabilities of Dominion Bank; and FDIC in its capacity as a United States insurance corporation (FDIC/Corporation) purchased the remaining "unacceptable" assets.

One of the "unacceptable" assets acquired by FDIC/Corporation was the letter of credit issued by Bank of Boulder. When FDIC/Corporation subsequently attempted to draw on the letter, Bank of Boulder refused to honor the drafts. Thereafter, FDIC/Corporation brought this action in the United States District Court for the District of Colorado to obtain payment on the letter of credit.

Bank of Boulder filed a motion to dismiss, claiming that (1) the transfer of the letter of credit to FDIC/Corporation was invalid and therefore FDIC/Corporation could not bring an action enforcing the terms of the letter and (2) FDIC/Corporation is proceeding essentially as a receiver of a state bank and therefore can bring an action only in state court.[1] The district court granted Bank of Boulder's motion, determining that the letter of credit, which transferred by operation of law to the state banking commissioner and to FDIC/Receiver, could not be validly transferred to FDIC/Corporation. 622 F.Supp. 288. Specifically, because the letter of credit did not expressly state that it was transferable or assignable, the district court determined that the right to draw on the letter could not be transferred under state law, Colo.Rev.Stat. § 4-5-116(1) (1973), which provides that "the

1 When FDIC brings suit in its capacity as receiver of a state bank, asserting the rights of the state bank and its depositors, creditors, or stockholders, FDIC is required to bring suit in state court. This jurisdictional limitation is found in 12 U.S.C. § 1819 (Fourth) (1982), which states in pertinent part: "[A]ny such suit to which the [FDIC] is a party in its capacity as receiver of a State bank and which involves only the rights or obligations of depositors, creditors, stockholders, and such State bank under State law shall not be deemed to arise under the laws of the United States."

right to draw under a credit can be transferred or assigned only when the credit is expressly designated as transferable or assignable."[2] Also, by its terms, the letter of credit was made subject to the Uniform Customs and Practice for Documentary Credits, International Chamber of Commerce Publication No. 290 (1974 Revision) (UCP). Article 46 of the UCP provides that a letter of credit can be transferred only if it is expressly designated as transferable. Applying these transfer restrictions, the district court concluded that FDIC/Corporation could not acquire or enforce the letter of credit. Rather, FDIC/Receiver would have to bring suit on the letter and could do so only in state court.

On appeal, FDIC/Corporation contends that the district court erred in enforcing the transfer restrictions. According to FDIC/Corporation, federal statutory and common law governs the transfer of assets to FDIC/Corporation in a P & A and dictates that a failed bank's otherwise non-transferable or nonassignable assets may be purchased and acquired by FDIC/Corporation.

The issue presented is whether FDIC/Corporation can purchase and acquire the right to draw on a letter of credit from FDIC/Receiver in the course of a P & A transaction, notwithstanding that the letter is nontransferable under state law or by its own terms.

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2 Although section 4-5-116(1) restricts the transferability of the right to draw on the letter of credit, we note that Colo.Rev.Stat. § 4-5-116(2) (1973) allows the beneficiary (and, we believe, the receiver who steps into the beneficiary's shoes) to assign its right to the proceeds under the letter. Moreover, as confirmed in Colo.Rev.Stat. § 4-5-116(3) (1973), a beneficiary (or its receiver) is entitled to transfer or negotiate drafts or demands properly drawn on the letter. We do not decide, inasmuch as the parties did not address the issues on appeal, whether or not FDIC/Receiver assigned its right to the proceeds under the letter to FDIC/Corporation or whether FDIC/Receiver transferred or negotiated drafts or demands drawn on the letter to FDIC/Corporation.

II.

The FDIC is an instrumentality created by Congress to promote stability and restore and maintain confidence in the nation's banking system. *See FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 432-35, 106 S.Ct. 1931, 1935-1936, 90 L.Ed.2d 428 (1986); S.Rep. No. 1269, 81st Cong., 2d Sess. 2-3, *reprinted in*, 1950 U.S.Code Cong. Serv. 3765, 3765-66 (FDIC's purpose is to bring depositors sound, effective, and uninterrupted operation of banking system with resulting safety and liquidity of bank deposits). To achieve this objective, FDIC insures bank deposits. One of its primary duties as insurer is to pay depositors when an insured bank fails. *Gunter v. Hutcheson*, 674 F.2d 862, 865 (11th Cir.), *cert. denied*, 459 U.S. 826, 103 S.Ct. 60, 74 L.Ed.2d 63 (1982), *overruled on other grounds, Langley v. FDIC*, 484 U.S. 86, 108 S.Ct. 396, 98 L.Ed.2d 340 (1987); *FDIC v. Godshall*, 558 F.2d 220, 221 (4th Cir.1977). In fulfilling this duty, FDIC has various options available to it. One option is to close the failed bank, liquidate its assets, and pay the depositors their insured amounts, covering any shortfall with insurance funds. This procedure, however, has several disadvantages. The sight of a closed bank does not promote stability or confidence in the banking system. "Accounts are frozen, checks are returned unpaid, and a significant disruption of the intricate financial machinery results." *Gunter*, 674 F.2d at 865; *accord FDIC v. Merchants National Bank*, 725 F.2d 634, 637 (11th Cir.) (lost jobs, checks returned unpaid, interruption of banking services in community, erosion in public confidence, adverse impact on affiliated or independent banks), *cert. denied*, 469 U.S. 829, 105 S.Ct. 114, 83 L.Ed.2d 57 (1984). Additionally, paying the deposit liabilities of the failed bank may result in a substantial loss to FDIC's insurance fund; and depositors may have to wait for some time to recover even the insured portion of their deposits. Uninsured

funds may be irretrievably lost since uninsured deposit liabilities and debts owed to other creditors are paid on a pro rata basis only after the receivership liquidates all of the assets and covers all costs of liquidation. *Merchants National Bank,* 725 F.2d at 637.

To avoid the significant problems associated with full-scale liquidation, FDIC whenever feasible employs a P & A transaction, a dramatically effective and cost-efficient way to protect depositors, the banking system, and the resources of the insurance fund. Generally, a P & A involves three entities: the receiver, the assuming bank, and FDIC as insurer. When FDIC is appointed as receiver, it acts simultaneously in two separate capacities: as receiver of the failed bank and as insurer of the deposits. *See Gunter,* 674 F.2d at 865; *FDIC v. Ashley,* 585 F.2d 157, 160 (6th Cir.1978); *Godshall,* 558 F.2d at 222 n. 4, 223; *Freeling v. Sebring,* 296 F.2d 244, 245 (10th Cir.1961); *FDIC v. Hudson,* 643 F.Supp. 496, 498 (D.Kan.1986).

In a P & A, the assuming bank purchases the failed bank, assuming deposit and other liabilities, and immediately reopens the failed bank with no interruption in vital banking operations and no loss to depositors. *Merchants National Bank,* 725 F.2d at 638; *Gunter,* 674 F.2d at 865. The possibility that depositors will not receive their full deposit is averted since the assuming bank is able to pay deposits upon demand. *FDIC v. Wood,* 758 F.2d 156, 160-61 (6th Cir.), *cert. denied,* 474 U.S. 944, 106 S.Ct. 308, 88 L.Ed.2d 286 (1985). The insurance fund is also protected and the risk of loss to FDIC is generally reduced.

A P & A "must be consummated with great speed, usually overnight." *Gunter,* 674 F.2d at 865, *cited in Langley,* 108 S.Ct. at 401; *see Wood,* 758 F.2d at 160; *Gilman v. FDIC,* 660 F.2d 688, 694 (6th Cir.1981). Indeed, because speed is the essential predicate and most striking advantage of a P & A, FDIC is able to preserve and realize upon a valuable

asset that would otherwise be lost—the going concern value of the failed bank. Also, as mentioned, FDIC is able to avoid interrupting banking services for even one day.

Because time constraints often prohibit an assuming bank from fully evaluating its risks, and so that P & A's are an attractive deal, the assuming bank need only purchase those assets which are of the highest banking quality, i.e., the "acceptable" assets. Consequently, when the assumed liabilities exceed the value of the assets purchased, FDIC/Receiver agrees to pay the assuming bank the difference in cash, less a credit for the going concern value of the failed bank. The cash is paid from FDIC/Corporation's insurance fund in consideration for which FDIC/Corporation acquires the assets not transferred to the assuming bank, i.e., the "unacceptable" assets. As a critical part of the P & A, FDIC/Corporation thereby finances the P & A and facilitates its implementation by providing FDIC/Receiver with the cash needed to consummate the P & A. *See Langley,* 108 S.Ct. at 401 (Court recognizes FDIC/Corporation's important role in financing P & A's); *Merchants National Bank,* 725 F.2d at 637-38.

FDIC/Corporation's purchase of the failed bank's "unacceptable assets" is authorized under 12 U.S.C. § 1832(c)(2)(A) (1982) (emphasis added), which provides: "In order to facilitate . . . the sale of assets of such insured bank and the assumption of such insured bank's liabilities by an insured institution . . . [FDIC/Corporation] is authorized . . . to *purchase any such assets* [of the failed bank]. . . . " Additionally, 12 U.S.C. § 1823(d) (1982) states that a receiver of a failed state bank is "entitled to offer the assets of [the failed bank] for sale to [FDIC/Corporation]" upon receiving permission from the appropriate state authority. *See FDIC v. Abraham,* 439 F.Supp. 1150, 1151-52 (E.D.La.1977). Also under section 1823(d), FDIC/Corporation is entitled to "purchase . . . any part of the assets of [a failed bank]."

[1] The transfer of FDIC/Receiver's right, title, and interest in the "unacceptable" assets to FDIC/Corporation for an amount that the assuming bank accepts in lieu of the "unacceptable" assets is a bona fide transfer of assets, not a sham transaction as Bank of Boulder contends. *See Gunter,* 674 F.2d at 874; *Ashley,* 585 F.2d at 160-63; *Godshall,* 558 F.2d at 222-23; *see also FDIC v. Braemoor Associates,* 686 F.2d 550, 553 (7th Cir.1982) (it is unlikely that a state court which approves transfer would have allowed FDIC/Corporation to acquire assets without conveying value), *cert. denied,* 461 U.S. 927, 103 S.Ct. 2086, 77 L.Ed.2d 297 (1983). After the transfer, FDIC/Corporation attempts to enforce and liquidate the "unacceptable" assets to recoup its cash outlay and thereby minimize the loss to the insurance fund. In doing so, FDIC/Corporation may bring actions and prosecute claims in its own right; and, contrary to Bank of Boulder's contention, FDIC/Corporation properly acts in its corporate capacity, not as a receiver of the failed bank. *See Braemoor Associates,* 686 F.2d at 552; *Ashley,* 585 F.2d at 159-64; *Godshall,* 558 F.2d at 222-23; *Hudson,* 643 F.Supp. at 497. Indeed, if no recovery is realized on an asset, FDIC/Corporation generally bears the loss; the failed bank and its depositors, creditors, and stockholders are unaffected. *Godshall,* 558 F.2d at 223 & n. 7 (recovery flows into FDIC's corporate treasury, not to receivership estate; excess recovery, if any, does not change characterization of suit).

For a P & A to be financed by FDIC/Corporation and thereby implemented, the P & A must be less costly than liquidating the failed bank.[3] Specifically, 12 U.S.C.

3 A P & A may also be approved in the extraordinary case when FDIC/Corporation determines that the continued operation of an insured bank is "essential to provide adequate banking services in [the] community." 12 U.S.C. § 1823(c)(4)(A) (1982); *see Wood,* 758 F.2d at 161.

§ 1823(c)(4)(A) (1982) states: "No assistance shall be provided . . . in an amount in excess of that amount which [FDIC/Corporation] determines to be reasonably necessary to save the cost of liquidating, including paying the insured accounts of, such insured bank . . . ." This determination must be made by FDIC/Corporation with as much speed as the assuming bank's decision to purchase the failed bank. Consequently, before deciding whether or not to finance a P & A, FDIC/Corporation must be able to rely on and quickly review the failed bank's books and records to estimate which assets will be considered "unacceptable" by the assuming bank and which of those assets ultimately will be collectible, thus estimating the cost of the P & A and comparing that to the expected loss from straight liquidation. The cost of a P & A is obviously increased when FDIC/Corporation is not able to acquire or enforce an "unacceptable" asset because it is determined to be nontransferable.

III.

A.

FDIC/Corporation's first contention is that 12 U.S.C. § 1823(c)(2)(A), which authorizes it to purchase any assets of a failed bank in the course of a P & A, contemplates the unrestricted transferability of assets to FDIC/Corporation in a P & A. Thus, according to FDIC/Corporation, section 1823(c)(2)(A) permits it to purchase and acquire assets that are otherwise nontransferable under state law or by their own terms.

In support of its contention, FDIC/Corporation cites *FDIC v. Rectenwall,* 97 F.Supp. 273 (N.D.Ind.1951), a case dealing with the insolvency of a state bank. In *Rectenwall,* the court determined that although an action for personal torts is not assignable under state law, the statutory scheme embodied in the predecessor of section 1823(c)(2)(A) "contemplates

the unrestricted transferability of every asset of an insured bank, at least where necessary to accomplish the assumption of its deposit liabilities by another insured bank." *Rectenwall*, 97 F.Supp. at 274; *see also Chatham Ventures, Inc. v. FDIC*, 651 F.2d 355, 358 (5th Cir.1981), *cert. denied*, 456 U.S. 972, 102 S.Ct. 2234, 72 L.Ed.2d 845 (1982); *Hudson*, 643 F.Supp. at 498. The court reasoned: "If this were not so, the usefulness of [the P & A] would largely be defeated. . . . " *Rectenwall*, 97 F.Supp. at 274. The court then concluded that the phrase "purchase any such assets" adequately expresses an intention to make otherwise nonassignable assets transferable to FDIC/Corporation. *Id.* at 275; *accord FDIC v. Main Hurdman*, 655 F.Supp. 259, 267-68 (E.D.Cal.1987) (congressional purpose in creating FDIC would be inhibited by application of state-law strictures).

FSLIC v. Fielding, 309 F.Supp. 1146 (D.Nev.1969), *cert. denied*, 400 U.S. 1009, 91 S.Ct. 567, 27 L.Ed.2d 621 (1971), also supports FDIC/Corporation's contention. In *Fielding* the defendants argued that because a chose in action for fraud could not be assigned under state law, an assignment of that asset to FSLIC was invalid. In determining that the validity of the assignment was not controlled by state law, the court stated: "The [FSLIC's] right under [a statute similar to section 1823(c)(2)(A)] to purchase assets of a state-chartered insured savings and loan company requires the application of federal law to determine the transferability of the assets." *Id.* at 1151. Concluding that the assignment was valid, the court reasoned that it was reasonably necessary that the powers granted to FSLIC to "purchase assets of an insured institution and otherwise to protect the depositors and its own position as insurer be construed impliedly to support the acceptance of an assignment of assets to secure repayment of loans made." *Id.*

Although section 1823(c)(2)(A) has considerable force in our concluding that the letter of credit in this case was validly

acquired by FDIC/Corporation, we do not rely on this statutory authorization alone but consider FDIC/Corporation's argument regarding the application of federal common law.

B.

FDIC/Corporation's second contention is that federal common law should be developed to allow it to purchase the nontransferable assets of a failed state bank in order to facilitate P & A's. To fashion a rule that supercedes conflicting state law,[4] overrides transfer restrictions, and allows for the transferability of otherwise nontransferable assets, we must conclude that (1) a uniform federal rule allowing FDIC/Corporation to acquire nontransferable assets in P & A's is needed to effectuate the interests of the federal deposit insurance program; (2) application of transfer restrictions frustrates specific objectives of the federal deposit insurance program; and (3) application of a federal rule will not

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4 We start from the premise that the transferability of the letter of credit in this case is restricted if Colorado law is applied, as the district court determined. We note, however, that although Colorado law places transfer restrictions on letters of credit under normal commercial stituations, an argument could be made that Colorado law provides for the transferability of otherwise nontransferable assets to FDIC/Corporation once a state bank fails. In this regard, Colo.Rev.Stat. § 11-5-105(4) (1973) specifies that if FDIC accepts appointment as liquidator of a failed state bank, FDIC/Receiver "has all the powers and privileges provided by the laws of [Colorado] with respect to liquidation of a banking institution, its depositors, and other creditors." Among the statutory provisions granting powers and privileges to a receiver of a state bank, Colo.Rev.Stat. § 11-5-106(1) (1973) provides that "all or any part of the assets of [the failed bank] may be sold to [FDIC/Corporation]." Because section 11-5-106(1) does not expressly state that even the nontransferable assets can be sold to FDIC/Corporation, and because the district court and the parties did not rely on or refer to section 11-5-106(1), we do not make any determinations with regard to the application of section 11-5-106(1) to the specific circumstances of this case.

disrupt commercial relationships predicated on state law. *See United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728-29, 99 S.Ct. 1448, 1458-59, 59 L.Ed.2d 711 (1979); *Wood*, 758 F.2d at 159.

First, we are convinced that there is a need for a nationally uniform rule allowing FDIC/Corporation to acquire the nontransferable assets of a failed bank in the course of a P & A. Without such a rule, FDIC/Corporation is subjected to any and all transfer restrictions and varying laws and is faced with an enormous administrative burden in trying to determine whether or not to finance a P & A. Specifically, FDIC/Corporation would have to determine the transferability status of every asset. Because the terms of one asset inevitably differ from the terms of another, and because state laws vary, FDIC/Corporation would not be able to limit its evaluation of the failed bank's assets to a quick review of the bank's records. Instead, FDIC/Corporation would be forced to examine in detail the terms of every asset to determine which state law applies, whether the asset itself restricts transferability, and whether the asset refers to other laws that may impact the asset's transferability. FDIC/Corporation would then have to locate, review, and interpret varying state laws and all laws referenced in the asset to find every possible transfer restriction. To require FDIC/Corporation to do all this under the striffi of a P & A is asking the impossible. Hence, the P & A method of handling bank failures would be effectively foreclosed. Such a result runs directly counter to the policies behind the creation of the FDIC—promoting stability and confidence in the banking system.

The difficulty with determining, under the time constraints of a P & A, whether or not an asset is transferable is evident in this case. Nothing on the face of the letter of credit indicated that the letter was nontransferable. As mentioned above, under Colorado law, the letter of credit was deemed nontransferable because it did not expressly state otherwise.

Also, although the letter was made subject to the UCP, the letter did not state that the UCP limited or even affected transferability. FDIC would have had to review Colorado law, the provisions of the UCP, and all other laws referenced in the letter to conclude that the letter was nontransferable.[5] Additionally, even if the letter of credit had stated on its face that it was nontransferable, FDIC/Corporation still would have had to study the letter in detail, along with every other asset, to determine whether or not the letter could be validly transferred to it. The need for expeditious implementation of a P & A suggests that the FDIC, in either of its capacities, cannot be expected to examine all the assets to locate all possible transfer restrictions. *See Gilman*, 660 F.2d at 694-95; *FDIC v. Stone*, 578 F.Supp. 144, 146 (E.D.Mich.1983) (in rehabilitating a failing bank, FDIC/Corporation "must act quickly and must purchase all of the unacceptable assets of the bank"; FDIC/Corporation cannot be expected to carefully examine the assets before deciding to facilitate the P & A).

A uniform rule permitting FDIC/Corporation to acquire otherwise nontransferable assets in a P & A would eliminate the need for detailed examination of the failed bank's assets and of varying laws. Cost estimates could be made quickly and with greater accuracy, and P & A's could thereby be implemented with fewer risks and the necessary speed. Because the P & A is an extremely valuable tool, such a uniform rule furthers the obvious advantages of P & A's and the interests of the federal deposit insurance program. Indeed, the "free assignability of assets from failing insured banks to the FDIC realistically addresses the frequent need of

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5 In view of our holding in this case, we need not decide whether the restrictions under state law or the UCP were disclosed, apparent, or known to FDIC at the time of the P & transaction, or whether FDIC should have known about the restrictions or been familiar with the laws making the letter nontransferable.

the FDIC to operate under emergency conditions in rescue situations. A need by the FDIC to determine assignability on an asset-by-asset basis would surely slow a rescue operation down, when dispatch was required." *Main Hurdman*, 655 F.Supp. at 268. Moreover, P & A's would be more cost effective since transfer restrictions would not preclude recovery to the insurance fund.

Second, we are convinced that application of transfer restrictions frustrates and significantly interferes with the specific objectives of the federal deposit insurance program. As indicated above, a cost-effective P & A is clearly preferred to full-scale liquidation and best serves the interests of the public, the insurance fund, and the depositors and other creditors of the failed bank. If transfer restrictions are enforced against FDIC/Corporation, P & A's become that much more expensive since FDIC/Corporation is not able to collect on the nontransferable assets, reducing recovery to the insurance fund.[6] In light of the congressional mandate that P & A's be

6 That FDIC/Receiver could retain and liquidate nontransferable assets and accordingly reduce the amount that FDIC/Corporation would have to pay in a P & A defeats the purpose behind FDIC/Corporation's participation in P & A's. FDIC/Receiver must obtain sufficient funds from FDIC/Corporation in exchange for the assets that are not purchased by the assuming bank since the acquired funds are turned over to the assuming bank as part of the P & A agreement. Without sufficient funds, the P & A cannot be adequately financed. Likewise, that FDIC/Receiver—without reducing the cost of the P & A to FDIC/Corporation and thereby obtaining sufficient funds to finance the P & A—could retain or later reacquire the nontransferable assets and subsequently liquidate those assets defeats the advantages and structure of P & A's. For example, FDIC/Corporation must have the right to enforce the "unacceptable" assets in its own right so that payments are made for the benefit of the insurance fund, not the receivership estate. Further, one of the resulting advantages of a P & A is eliminating the need for constant court supervision that is necessary for a receiver to act. *See Ashley*, 585 F.2d at 163. Also, it would place a burden on the receivership estate and defeat the advantages of P & A's if, after a P & A nas been consummated, FDIC/Receiver must attempt to enforce the terms of all nontransferable assets.

less costly than liquidation, increasing the cost of the P & A could very well prevent P & A's in many cases. This adverse consequence results in a potentially enormous cost to the banking system as a whole.

Furthermore, even if a P & A is estimated to be less costly than full-scale liquidation notwithstanding application of transfer restrictions, the fact that FDIC/Corporation is forced to examine every asset in detail and review and analyze varying laws to locate possible restrictions would delay implementation of the P & A, thereby diluting its advantages. Since speed is the essence of P & A's, FDIC/Corporation may have to forego an exhaustive examination and enter P & A's at a substantial risk of loss of recovery to the insurance fund. Or, FDIC/Corporation may be forced to choose not to implement P & A's because a reasonably accurate cost estimate cannot be made within the limited time demand. "[D]ecisions concerning the appropriate method of dealing with a bank failure must be made with extraordinary speed. . . . Subjecting the FDIC to the additional burden of considering the impact of possibly variable state law on the rights involved could significantly impair the FDIC's ability to choose between the liquidation and [P & A] alternatives in handling a bank failure." *Gunter*, 674 F.2d at 869.

Third, we are convinced that application of a federal rule permitting FDIC/Corporation to acquire nontransferable assets in the course of a P & A does not disrupt commercial relationships predicated on state law. The rule would come into effect only after an insured bank has failed. Parties cannot reasonably expect to carry on normal commercial relationships at that point, and it is doubtful that the eventuality of bank failure plays a significant role in the ordinary commercial expectations of the parties. Indeed, the potential damage to parties' expectations is far outweighed by the interference with the federal goals of stability and confidence in the national banking system that would result if

FDIC/Corporation is not allowed to acquire nontransferable assets in a P & A.

Moreover, application of the rule in this case simply means that FDIC/Corporation, not FDIC/Receiver, is entitled to enforce the terms of the letter of credit. Although the issuer of a nontransferable letter of credit under normal circumstances is only obligated to honor demands for payment made by the beneficiary specifically named in the letter, the issuer certainly may be required to honor a receiver's drafts when the beneficiary bank fails and is put into receivership. Since the issuer must go beyond the letter itself to honor the receiver's drafts or other demands for payment, the mere transfer of the letter to FDIC/Corporation as a part of a P & A, requiring the issuer to pay FDIC/Corporation rather than the receiver, does not place a substantial burden on the issuer. Bank of Boulder contends, however, that the issuer is prejudiced when it must look beyond the letter itself to assess the validity and propriety of FDIC/Corporation's acquisition of the letter. We do not agree that the issuer is put in a difficult situation, especially in view of the fact that the transfer of the "unacceptable" assets is approved by the state receivership court and is statutorily authorized, and relevant documents are a matter of public record.

Bank of Boulder also contends that when FDIC is appointed receiver of a failed state bank, it can skirt the jurisdictional limitations in 12 U.S.C. § 1819 (Fourth) by transferring assets to itself in its corporate capacity. Our holding, however, is limited to the assets that FDIC/Corporation acquires in the course of financing a P & A. Allowing FDIC to come into federal court in that instance, in view of the overriding benefits of a P & A, does not conflict with the limited jurisdictional exception applicable to suits involving FDIC in its capacity as receiver of a state bank.

As a final point, if the transfer restrictions are recognized in this case, we are persuaded that Bank of Boulder will get an

unjustified windfall. Although FDIC/Corporation financed the P & A of Dominion Bank, it will not be able to collect on the letter of credit simply because of the insolvency of Dominion Bank and the nature of the statutorily authorized transaction under which Dominion Bank's assets were liquidated. This loss of recovery to the insurance fund is detrimental to the federal deposit insurance program, frustrates the public policies behind the scheme of national banking insurance, and cannot be justified.

[2] We conclude that a rule allowing FDIC/Corporation to purchase and acquire otherwise nontransferable assets in a P & A is appropriate and necessary to give effect to FDIC/Corporation's statutory authorization to finance and facilitate the implementation of P & A's. FDIC/Corporation is properly proceeding in its corporate capacity, not as a receiver, and can enforce the letter of credit it its own right and bring suit against Bank of Boulder in federal court pursuant to 12 U.S.C. § 1819 (Fourth). The district court erred in enforcing the transfer restrictions against FDIC/Corporation. Accordingly, the district court's order dismissing this action is REVERSED.

BALDOCK, Circuit Judge, dissenting.

The majority ventures beyond the letter of credit involved in this case and concludes that the grant of authority which allows the FDIC-corporation to purchase assets from a failed bank, 12 U.S.C. § 1823(c)(2)(A), also allows the FDIC-corporation to purchase and acquire assets of a failed bank free of express transfer restrictions created by state law or by agreement. The majority does not merely rest its holding on its reading of the statute, however. Instead, the majority enacts a new rule of federal common law allowing the FDIC-corporation to purchase and acquire *any* asset of a failed bank free of express transfer restrictions.

What is striking about much of the majority opinion is its resemblance to a legislative committee report, but without supporting congressional testimony. The short record in this case contains no evidence to support the majority's prescriptive discussion about the mechanics of asset disposition at a failed bank and, in particular, about the necessity and advantages of allowing the FDIC-corporation to take *any* asset free of express transfer restrictions. These matters, which involve legislative and executive policy determinations, were not addressed below.

I respectfully dissent for several reasons. First, in creating new law, the majority overlooks the unique nature of the asset involved in this case, a letter of credit (documentary credit). A letter of credit is a widely used commercial instrument that traditionally has not been assignable in the absence of an express provision allowing assignment. Second, the majority's holding is far too broad. Each type of bank asset should turn on its own facts and circumstances; we simply have no way of foreseeing whether every asset is properly transferable despite transfer restrictions to the contrary. Third, the majority ventures outside the record for its rationale. There is no evidence concerning the FDIC-corporation's customary procedure in a purchase and assumption transaction. There is insufficient evidence about how the FDIC evaluated the letter of credit before and after Dominion Bank failed. This is not a situation where the facts may be assumed with confidence; indeed, the parties do not agree as to all relevant facts. Fourth, I view the majority's approach as too great an incursion into international trading convention, state law and private contractual arrangements. Whether a letter of credit is transferable to the FDIC-receiver by operation of law is a matter well-suited for state court resolution given the express limitation on federal jurisdiction contained in 12 U.S.C. § 1819 (Fourth). I would affirm the district court.

There are two common types of documentary credits, commercial and standby letters of credit. A commercial letter of credit is used in connection with the purchase of goods. A standby letter of credit is used to insure payment of a money obligation in the event of a default. *Federal Deposit Ins. Corp. v. Philadelphia Gear Corp.*, 476 U.S. 426, 428, 106 S.Ct. 1931, 1933, 90 L.Ed.2d 428 (1986). In a traditional letter of credit transaction, the customer (applicant, account party or buyer) enters into an agreement with the issuer (bank) whereby the issuer promises to pay the beneficiary (seller) upon proper presentation of documents and full compliance with the terms and conditions of the letter of credit. *Arbest Constr. Co. v. First Nat'l Bank & Trust Co. of Oklahoma City*, 777 F.2d 581, 583 (10th Cir.1985). Three separate relationships are involved: 1) one between the customer and the beneficiary based on an underlying agreement (e.g., sale of goods by beneficiary to customer or extension of credit by beneficiary to customer) which imposes a financial obligation on the customer; 2) one between the customer and the issuer in which the issuer agrees to issue the letter of credit in favor of the beneficiary and the customer agrees to repay the issuer; and 3) one between the issuer and the beneficiary in which the beneficiary may draw on the letter of credit upon presentation of proper documents and compliance with the terms of the letter. *Id.* The letter of credit allows the beneficiary to rely on the issuer's credit, rather than on the customer's, for satisfaction of the underlying financial obligation of the customer to the beneficiary. *Leney v. Plum Grove Bank*, 670 F.2d 878, 881 (10th Cir.1982).

Several important features of the letter of credit make it commercially attractive. The relationship between the issuer and the beneficiary is independent of the underlying transaction between the customer and the beneficiary. 1974 UCP, General provisions and definitions c.; *Colorado Nat'l Bank of Denver v. Board of County Comm'rs of Routt County*, 634 P.2d 32, 37 (Colo.1981). Thus, all parties concerned deal in

documents, not in goods or the subject matter of the underlying transaction between the customer and the the beneficiary. 1974 UCP art. 8b. If the documents presented for payment or to draw on the letter of credit comply, on their face, with the terms and conditions of the letter of credit, the issuer will honor the letter of credit and the customer is required to reimburse the issuer. 1974 UCP art. 3a, 8b.

The documentary credit in this case is a standby letter of credit. A customer of the Bank of Boulder, Mr. Reed, obtained the letter of credit from the issuer, the Bank of Boulder, in favor of the beneficiary, Dominion Bank. Dominion Bank was entitled to draw on the credit by a sight draft accompanied by a certification by Dominion Bank that the amount drawn represented amounts due on a promissory note in which Mr. Reed was the maker and Dominion Bank was the payee. The FDIC, in its capacity as liquidator of Dominion Bank, attempted to draw on the credit after furnishing a letter certifying that the amount of the drawing represented unpaid principal and interest due and owing on Mr. Reed's note.

Article 5 of the Uniform Commercial Code (UCC) concerns letters of credit and would apply to this letter of credit in the absence of a provision indicating otherwise. *See* Colo.Rev.Stat. §§ 4-5-101 to 4-5-117 (art. 5 of the UCC as codified in Colorado), 4-5-102(3) (scope of art. 5) (1973). There is another widely used source of rules pertaining to letters of credit, however. The International Chamber of Commerce has developed the Uniform Customs and Practice for Documentary Credits, "a code of practice which is recognized by banking communities in 156 countries." Int'l Chamber of Commerce (ICC), Pub. No. 305 Guide to Documentary Credit Operations 1 (1978). Documentary credits are used widely in international trade and involve "thousands of transactions and billions of dollars every day in every part of the world." *Id.* It is essential that there be a

standard and consistent application of the rules concerning documentary credits.

The letter of credit in this case expressly states that it is subject to the Uniform Customs and Practice for Documentary Credits (1974 Revision) (1974 UCP). *See* Int'l Chamber of Commerce, Pub. No. 290 Documentary Credits (1975).[7] Thus, the 1974 UCP governs the rights of the parties. The UCP provides that: "A credit can be transferred only if it is expressly designated as 'transferable' by the issuing bank." 1974 UCP art. 46(b). "It should be noted that a credit would only be issued as a transferable one on the specific instructions of the applicant. This would mean that both the credit application form and the credit itself must clearly show that the credit is to be transferable." Int'l Chamber of Commerce, Pub. No. 305 Guide to Documentary Credit Operations 31 (1978). If a credit is not transferable, the beneficiary still has the right to assign the proceeds in conformity with applicable law. 1974 UCP art. 47.[8] These provisions of the UCP are similar to those found in art. 5 of the Uniform Commercial

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7 A 1983 revision of the UCP is available. The provision of the 1974 UCP concerning transferability of a letter of credit that applies in this case, art. 46(d), is now found in art. 54(b) of the 1983 UCP, but the substance remains the same. Int'l Chamber of Commerce (ICC), Pub. No. 411 Documentary Credits—UCP 1974/1983 Revisions Compared and Explained 82-84 (1984).

8 The UCC contains the "applicable law" concerning the assignment of proceeds. Colo.Rev.Stat. § 4-5-116(2) (1973 & 1987 Supp.) provides:

> Even though a credit specifically states that it is nontransferable on nonassignable, the beneficiary may before performance of the conditions of the credit assign his rights to proceeds. Such an assignment is an assignment of an account under article 9 of this title on secured transactions and is governed by that article, except that:
>
> (a) The assignment is ineffective until the letter of credit or advice of credit is delivered to the assignee, which delivery constitutes perfection of the security interest under article 9 of this title; and

(footnote continues)

Code. Section 4-5-116(1) provides that "[t]he right to draw under a credit can be transferred or assigned only when the credit is expressly designated as transferable or assignable." Colo.Rev.Stat. § 4-5-116(1). The beneficiary, however, may assign his right to proceeds. *Id.* § 4-5-116(2) (1973 & 1987 Supp.).

The difference between assignment of a letter of credit and assignment of its proceeds is that assignment of the letter allows the assignee to execute and sign drafts which the issuer must honor. *Shaffer v. Brooklyn Park Garden Apts.*, 311 Minn. 452, 250 N.W.2d 172, 177 (1977). If a letter of credit is not expressly assignable, the assignee only has the right to proceeds, that is "the right to receive drafts properly drawn by the beneficiary." *Id.*

The rule concerning assignability of letters of credit involves two competing policies. J. Dolan, The Law of Letters of Credit § 10.02 (1984). As a general proposition, the law does not favor restraints on alienation of property. But the law also does not favor the delegation of contract rights and liabilities which are inherently personal. Documentary credit law seeks to accommodate both policies by allowing assignment when there is an express designation; in the absence of an express designation, the beneficiary may still assign the right to proceeds. Assignability is an important attribute that may be bargained for—a beneficiary is free to insist that a

(footnote continued)

(b) The issuer may honor drafts or demands for payment drawn under the credit until it receives a notification of the assignment signed by the beneficiary which reasonably identifies the credit involved in the assignment and contains a request to pay the assignee; and

(c) After what reasonably appears to be such notification has been received, the issuer may without dishonor refuse to accept or pay even to a person otherwise entitled to honor until the letter of credit or advice of credit is exhibited to the issuer.

letter of credit contain language making it assignable or transferable by operation of law. *See Hyland Hills Metropolitan Park and Recreational Dist. v. McCoy Enterprises*, 38 Colo.App. 23, 554 P.2d 708 at 710 (1976) (if the beneficiary is not satisfied with the terms of the credit, it could require the customer to supply another letter containing other terms). On the other hand, a customer may be apprehensive concerning "presentation of sensitive documents by a person whom he may not trust." J. Dolan, The Law of Letters of Credit ¶ 10.02 (1984).

An express designation of assignability protects that customer. Satisfactory performance of the terms of the credit depends upon proper presentation of documents by the beneficiary. In the absence of express consent, the customer's protection should not be diminished by a change in the beneficiary presenting the documents. *See Pastor v. Nat'l Republic Bank of Chicago*, 76 Ill.2d 139, 28 Ill.Dec. 535, 538, 390 N.E.2d 894, 897 (1979). In other words, requiring assignment in the absence of an express provision may alter the risk among the parties. *See* Official Comment 1 to Colo.Rev.Stat. § 4-5-116 (recognizing that the customer "may be deprived of real and intended security" if the beneficiary may delegate performance by assignment). There are a number of reasons why a customer may view assignability with disfavor, such as the potential for forgery of documents or the possibility that an unknown assignee may present documents which comply, yet not perform the underlying agreement satisfactorily.

Another reason for requiring an express designation of assignability lies in the doctrine of independence. In deciding whether to honor a draft, the issuer should look only at whether the documents and draft presented conform to the letter of credit. The relationship between the customer and the beneficiary is independent of the relationship between the issuer and beneficiary. Without an express designation of

assignability, however, the issuer must look behind the documents in deciding whether to honor a draft. This involves reference to the underlying transaction between the customer and the beneficiary to determine whether performance has occurred, thereby defeating the purpose of a letter of credit. Colorado repeatedly has recognized the importance of the independence doctrine. *Colorado Nat'l Bank of Denver v. Board of County Comm'rs of Routt County,* 634 P.2d at 40; *East Bank of Colorado Springs v. Dovenmuehle, Inc.,* 196 Colo. 422, 589 P.2d 1361, 1365 (1978), *aff'g,* 38 Colo.App. 507, 563 P.2d 24, 28 (1977); *Hyland Hills Metropolitan Park and Recreational Dist. v. McCoy Enterprises,* 38 Colo.App. 23, 544 P.2d 708, 710 (1976).

Colorado also has recognized the importance of the strict compliance doctrine. Colo.Rev.Stat. § 4-5-114; *Colorado Nat'l Bank of Denver v. Board of County Comm'rs of Routt County,* 634 P.2d at 40 ("To maintain the commercial vitality of the letter of credit device, strict compliance with the terms of the letter of credit is required."). We have noted that the issuer's duty to the beneficiary is a limited one—if the documents and draft conform, the issuer must honor the draft, if the documents and draft do not conform, the issuer must not honor the draft. *Arbest Contr. Co. v. First Nat'l Bank & Trust Co.,* 777 F.2d at 584-85.

Several cases have considered whether a letter of credit not designated as assignable may nevertheless be transferred to a successor entity. In *American Bell Int'l, Inc.* v. *Islamic Republic of Iran,* 474 F.Supp 420, 423-24 (S.D.N.Y.1979), the customer sought to enjoin the issuer from honoring a demand for payment under a letter of credit because a successor government had taken power after the letter of credit was executed. In rejecting this argument, the district court relied on the international law principle that a successor government succeeds to the contract rights of the predecessor government. *Id.* at 423 *accord American Bell Int'l v.*

Manufacturers Hanover Trust Co., N.Y.L.J., Mar. 29, 1979, at 6, col. 7 (N.Y.Sup.Ct.1979), *aff'd mem.*, 70 A.D.2d 830, 418 N.Y.S.2d 551 (N.Y.App.Div.1979). The district court determined that a demand by the successor government would sufficiently comply with the terms of a letter of credit. The district court was concerned that an opposite holding would elevate form over substance and would subject international financial commitments to the "vicissitudes of political power." 474 F.Supp. at 424.

In *Temple-Eastex Inc. v. Addison Bank*, 672 S.W.2d 793 (Tex.1984), *rev'g*, 665 S.W.2d 550 (Tex.App.1984), a parent corporation sought to enforce a standby letter of credit which had been distributed to it upon dissolution of a wholly-owned subsidiary. The letter of credit was silent as to transferability. The Texas Supreme Court held that the parent had succeeded to the rights of the subsidiary in the letter of credit based upon a state statute which provided that shareholders succeeded to the rights and claims existing prior to dissolution. *Id.* at 796. The court also held that the issuer bank should have been on inquiry notice concerning the rights of the parent based upon the circumstances including an explanation by the parent. *Id.* Finally, the court determined that a demand letter would suffice for a sight draft required by the letter of credit. *Id.* at 796-97. The case demonstrates little regard for the strict compliance doctrine. The decision by the court of appeals is more in accord with traditional letter of credit principles.

In *In re Swift Aire Lines, Inc.*, 20 B.R. 286, 288-89 (Bankr.C.D.Cal.1982), *rev'd*, 30 B.R. 490 (9th Cir.1983), the trustee in bankruptcy sought to enforce a nonassignable letter of credit in which the debtor was the beneficiary. The issuer declined to recognize the trustee as a beneficiary because the documents presented by the trustee did not strictly comply with the terms of the letter of credit. The debtor beneficiary had not signed the draft and other necessary documents, as the trustee of the bankruptcy estate had succeeded the debtor.

The bankruptcy court rejected this argument, reasoning that the federal law of bankruptcy would override the state principle of strict compliance and that form would be elevated over substance if the trustee were not allowed to enforce the letter of credit. *Id.* at 288.

The Ninth Circuit reversed the bankruptcy court, holding that state law did not conflict with federal bankruptcy law and that the latter "did not give the trustee the power to automatically enforce payment thereunder if state law requiring strict compliance of tender documents would dictate otherwise." *In re Swift Aire Lines, Inc.*, 30 B.R. at 495. In so deciding, the court emphasized the need for certainty in commercial transactions using letters of credit:

> Rules relating to the treatment of documents, such as letters of credit, providing for payments of funds in a complex commercial transaction have developed from a long history of pragmatic experience. This experience has shown the need for specificity in the conditions for payment and a corresponding need for absolute compliance with these specific conditions. In this manner, the customer, issuer, and beneficiary will have no doubts where they stand.

Id. at 496. The strict compliance doctrine enables the issuer to avoid liability based on wrongful honor and wrongful dishonor; when documents of questionable authority are presented the issuer is justified in not honoring the letter of credit. *Id.* at 496-497. The court distinguished the result of *American Bell* as controlled by international law principles; in domestic transactions the beneficiary's rights in a letter of credit vest solely in the named beneficiary absent proper assignment. *Id.* at 495.

In *Pastor v. National Republic Bank of Chicago*, 76 Ill.2d 139, 28 Ill.Dec. 535, 390 N.E.2d 894 (1979), *aff'g*, 56 Ill.App.3d 421, 14 Ill.Dec. 74, 371 N.E.2d 1127 (Ill.App.

1977), the customer sought to prevent the liquidator of an insurance company beneficiary from drawing upon a letter of credit in favor of the insolvent company. The customer contended that the letter of credit could not be transferred. The Illinois Supreme Court determined that the UCC's restriction on assignment did not apply because a voluntary transfer was not involved, rather the beneficiary's right to draft on the letter of credit was transferred to the liquidator by operation of law under a specific statute and by court order. *Id.* 28 Ill.Dec. at 539-40, 390 N.E.2d at 898-99. The court emphasized that its holding was one of "narrow scope" confined to a situation when the beneficiary had performed the underlying obligation to the customer and all that remained was for the beneficiary to recover on the credit. *Id.*

The approach taken in *Pastor* has been criticized as destroying the independence of the letter of credit because the issuer must be concerned with the original beneficiary's performance. J. Dolan, The Law of Letters of Credit ¶ 10.03[3] (1984). Erosion of the principles of independence and strict compliance reduce the certainty associated with letters of credit.

> The issuer of a credit reasonably expects to receive a draft drawn by the beneficiary. These cases force the issuer to decide whether concerns of international law, insurance liquidation law and bankruptcy law excuse strict compliance with terms of the credit. The burden of that inquiry is far greater than the burden the strict-compliance rule imposes on the issuer. Under the rule of these cases, issuers must invoke legal concepts and may have to litigate; under the strict compliance rule, the issuer need only determine whether the documents comply on their face with the terms of the credit.

Id. In the case before the court, the majority has determined that policy concerns outweigh deference to established law

regarding the transferability of letters of credit. While it is possible that Colorado might recognize the initial transfer of the letter of credit (to the FDIC-receiver) on the authority of *Pastor*, recognizing a subsequent transfer (to FDIC-corporation) would further impair the strict compliance principle.

In deciding that 12 U.S.C. § 1823(c)(2)(A) allows FDIC-corporation to purchase or acquire assets free of transferability restrictions, the majority relies upon cases involving the assignability of tort actions to the FDIC against those who may have contributed to the bank's insolvency. *See FDIC v. Hudson,* 643 F.Supp. 496 (D.Kan.1986) (tort action against bank's officers, directors and employees); *FDIC v. Main Hurdman,* 655 F.Supp. 259 (E.D.Cal.1987) (tort action against accounting firm which prepared allegedly false financial statements for borrower); *FSLIC v. Fielding,* 309 F.Supp. 1146 (D.Nev.1969) (suit against officers, directors and others associated with savings and loan association); *FDIC v. Rectenwall,* 97 F.Supp. 273 (N.D.Ind.1951) (tort action against cashier who allegedly paid drafts when drawer's accounts were insufficient to cover the drafts). The only case cited by the majority which did not involve a tort or quasi-tort action, *Chatham Ventures, Inc. v. FDIC,* 651 F.2d 355 (5th Cir.1981), *cert. denied,* 456 U.S. 972, 102 S.Ct. 2234, 72 L.Ed.2d 845 (1982), also did not involve a state law prohibition on assignment of the note in question. The court in that case specifically noted that it "need not decide what result would obtain if state law made the FDIC's rights worthless." *Id.* at 358 n. 4.

The statement in *FDIC v. Rectenwall,* 97 F.Supp. at 274, that the language of § 1823(c)(2)(A) "contemplates the unrestricted transferability of every asset of an insured bank, at least where necessary to accomplish the assumption of its deposit liabilities by another insured bank," simply is too broad. For example, it is unlikely that a personal service

contract would be assignable. While tort actions for the malfeasance of bank officers and directors may be assignable as a matter of federal law, there is no requirement that federal law must supply a rule of decision at odds with uniform state law. *See United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728, 99 S.Ct. 1448, 1458, 59 L.Ed.2d 711 (1979) (holding that a national rule is not needed to determine the priority of liens arising from federal lending programs). When there is a uniform rule of state and international law governing commercial transactions, only the most compelling reasons, not present in this case, ought to overturn that rule.

Whether to follow state law create federal common law depends upon several factors including: 1) the need for national uniformity; 2) whether application of state law would interfere with federal program objectives; and 3) whether application of a federal rule would disrupt commercial relationships based on state law. *Id.* The majority concludes that federal common law is needed not only in this case, but also in all cases involving the FDIC and transfer restrictions on bank assets. Because the above criteria must be applied to specific facts, I only address the contentions of the majority opinion insofar as they concern letters of credit. Applying these criteria to this case, I do not agree with the majority's conclusion.

The majority's conclusion that there is a need for a nationally uniform rule concerning the transferability of letters of credit is seriously undercut by the presence of a uniform rule prohibiting assignment, absent an express provision, in both the UCC and UCP. The UCC's provision concerning assignment, § 5-116, has been adopted in all 50 states, 2A Uniform Laws Ann. § 5-116 (Master ed. 1977 & 1988 Pamp.), and the UCP is used throughout the world. There is little mystery concerning letters of credit and the need for an express designation of assignment. *See, e.g.*, 12 C.F.R. § 208.8(d) (regulation of letters of credit for State

banks which are members of the Federal Reserve System); American Law Institute (ALI), Uniform Commercial Code Official Draft § 5-115 & Comment 1, 531-32 (1952) (adopting current rule); 6 W. Hawkland & T. Holland, UCC Series §§ 5-116:01, 5-116:02 (1984); 2 A. Squillante & J. Fonesca, The Law of Modern Commercial Practices § 7:32 (rev. ed. 1981); J. White & R. Summers, Uniform Commercial Code § 18-9 (2d ed. 1980). Thus, the majority is simply wrong when it speculates about the difficulty of determining whether this letter of credit was transferable.[9] *See* Majority Opinion at 1138-1140. The process described by the majority to evaluate transferability restrictions is without application to this case,[10] yet that error forms the premise for the majority's conclusion that the FDIC cannot be expected to examine bank assets quickly for transferability restrictions. By deciding this issue as a matter of law, the majority conveniently dispences with a need for factual inquiry in this or any other case. *See* Majority Opinion at 1139 n. 5 (no need to decide whether the FDIC knew or should have known that the letter of credit was not assignable).

If any inference can be made, it is that the transfer restrictions concerning this asset were known prior to its

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9 The letter of credit at issue is four short paragraphs and only references the UCP.

10 The majority states:

> Instead, FDIC/Corporation would be forced to examine in detail the terms of every asset to determine which state law applies, whether the asset itself restricts transferability, and whether the asset refers to other laws that may impact the asset's transferability. FDIC/Corporation would then have to locate, review, and interpret varying state laws and all laws referenced in the asset to find every possible transfer restriction. To require FDIC/Corporation to do all this under the time constraints of a P & A is asking the impossible.

Majority Opinion at 1139. This description finds no support in the record.

being designated an "unacceptable" asset. After all, this asset is a standby letter of credit issued by a solvent bank. The FDIC is not without familiarity concerning standby letters of credit. *See, e.g.*, 12 C.F.R. § 337.2 (standby letters of credit and unsafe banking practices). Moreover, the majority's analysis completely fails to address the FDIC's power to examine bank assets regularly and prior to bank failure.[11] *See* 12 U.S.C. § 1819 (Eighth). I cannot agree that changing the rule concerning assignability of letters of credit would 1) "eliminate the need for detailed examination of the failed bank's assets and of varying laws," or 2) enable the FDIC to prepare quicker and more accurate cost estimates concerning a failed bank, or 3) allow the FDIC to implement a purchase and assumption of a failed bank rather than liquidation. *See* Majority Opinion at 1139, 1141. There simply is no support in the record for these claimed advantages because there is no trial evidence concerning the importance of transfer restrictions on this or any other asset acquired by FDIC-corporation. Existing law concerning letters of credit is sufficently uniform so as to obviate the need for an independent federal rule.

Nor can the existing law be said to interfere with the objectives of the federal deposit insurance program in any significant way. The record is devoid of any "potentially enormous cost to the banking system," *id.* at 1140, if the FDIC-

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11 It is this factor which makes me seriously question the majority's conclusion that the FDIC operates under time constraints which would make it impossible to evaluate the transferability of assets. Bank examinations are performed at least annually, and more frequently if circumstances require. The FDIC acquires some familiarity with a bank's assets during this process, particularly if a bank has been classified as a problem bank and is subject to more frequent examinations. After a decision has been made to close a bank, the bank and its assets will be reviewed prior to any meeting of proposed bidders. In short, the FDIC will have some familiarity with most of the bank's assets prior to a purchase and assumption transaction.

corporation is not allowed a special exception to the general rule that a letter of credit is not assignable unless it says so. It is apparent that the majority seeks to reach a result that will allow recovery by the FDIC without giving due consideration to the unsettling influence such a precedent will have on state law.

This is not the type of problem that is so vital to the federal deposit insurance program that it requires "a high degree of inventiveness from the courts." *Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers of America AFL-CIO v. Hoosier Cardinal Corp.*, 383 U.S. 696, 701, 86 S.Ct. 1107, 1111, 16 L.Ed.2d 192 (1966). In this case, assuming Colorado would allow transfer by operation of law, the FDIC-receiver could assign the proceeds of the letter of credit to the FDIC-corporation.[12]

Allowing a letter of credit to be assigned in the absence of an express provision would disrupt commercial relationships predicated on state law. The issuer is forced to look beyond the letter of credit and review documents with no objective standard for determining whether a valid assignment has occurred. The majority is quite willing to impose this unanticipated burden on a commercial issuer, yet is most concerned with the possibility that the FDIC-corporation might have to review a bank asset for transferability restrictions (if it has not already done so). Given the potential liability for wrongful honor of a letter of credit, the majority has

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12 Thus, the FDIC-Receiver would not be required to "retain and liquidate" the letter of credit as assumed by the majority at 1140 n. 6. Footnote 6 of the majority opinion, listing the purported disadvantages of such a procedure, appears to assume that funds from this letter of credit would be used to complete *this* purchase and assumption transaction. This seems unlikely as the FDIC was appointed receiver for the bank on September 30, 1983, and the FDIC-Corporation did not attempt to draft on the letter of credit until October 5, 1984, based upon a default which occurred August 5, 1984.

imposed a significant burden on an issuer and has interfered with the commercial expectations of the customer.

The majority's final reason for enforcing this letter of credit in the hands of FDIC-corporation is not convincing. The majority concludes that the Bank of Boulder will get an unjustified windfall if the letter of credit is not assignable. On this record, we simply have no way of knowing whether the Bank of Boulder has been or will be paid by its customer if the letter of credit is honored. Moreover, we cannot say with certainty that the FDIC-corporation could not collect on the underlying note if the letter of credit is not honored.

I would affirm the district court's decision that this matter was suitable for state court resolution. In that way, the courts of Colorado could have decided whether the letter of credit was transferable by operation of law to the FDIC-receiver. If so, the FDIC-receiver could have assigned the proceeds to FDIC-corporation. If the letter of credit was not transferable, the FDIC-corporation could then sue on the underlying note. Because these options are available, I simply do not see the need to expand federal law into a commercial transaction involving a letter of credit. Moreover, I expect that the broad holding of the majority will have unanticipated application far beyond the facts of this case; I do not share the majority's confidence in our ability to decide cases in the absence of record facts.

ORDER

This matter comes on for consideration of appellee's petition for rehearsing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

Further, a vote having been taken on the suggestion for rehearing en banc, *see* Fed. R.App.P. 35(b), rehearing en banc is granted. Circuit Judges William J. Holloway, Jr., Monroe G. McKay and James K. Logan voted to deny rehearing en banc. Circuit Judge Robert H. McWilliams, who as a member of the hearing panel voted to deny the petition for rehearing, did not participate in consideration of the suggestion for rehearing en banc. Circuit Judge David M. Ebel did not participate in consideration of the suggestion for rehearing en banc.

The appellent shall file a supplemental brief on rehearing on or before January 14, 1989. Within 30 days after service of appellant's brief, appellee shall file a supplemental brief on rehearing. Within 14 days after service of appellee's supplemental brief, appellant may file a reply brief. All supplemental briefs shall be subject to the page limitations set forth in 10th Cir.R. 28.3. Counsel will be notified when oral argument on rehearing is set.

FEDERAL DEPOSIT INSURANCE CORPORATION,
A UNITED STATES CORPORATION,

Plaintiff,

v.

BANK OF BOULDER, A COLORADO CORPORATION,

Defendant.

Civ A. No. 85-Z-764.

**United States District Court,
D. Colorado.**

Dec. 4, 1985.

MEMORANDUM OPINION AND ORDER

WEINSHIENK, District Judge.

This is an action by the Federal Deposit Insurance Corporation (FDIC) in its corporate capacity seeking to enforce a letter of credit issued by the defendant Bank of Boulder. The matter is before the Court on defendant's Motion to Dismiss. Defendant's Motion was set for hearing on November 14, 1985, and was granted at that time. The Court is issuing a written opinion because of the unusual circumstances and the impact of this decision on other enforcement actions by the FDIC.

In its Motion to Dismiss the Bank of Boulder raises two issues which place the FDIC on the horns of a dilemma. On the one hand, the Bank of Boulder challenges the federal court's jurisdiction to hear this action because defendant asserts the FDIC is essentially proceeding in its capacity as a receiver. Only if plaintiff is suing in its corporate capacity

would the federal court have jurisdiction. On the other hand, defendant argues, if the FDIC is proceeding in its corporate capacity and jurisdiction is good, it cannot enforce a non-transferable letter of credit. Only FDIC as receiver can arguably enforce a non-transferable letter of credit because it received this asset by operation of law, and not by sale.

The jurisdictional issue is governed by 12 U.S.C. § 1819 Fourth. That section provides as follows:

> All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, . . . except that any such suit to which the Corporation is a party in its capacity as receiver of a State bank and which involves only the rights or obligations of depositors, creditors, stockholders, and such State bank under State law shall not be deemed to arise under the laws of the United States.

The defendant contends that this action falls within the exception clause in § 1819 and jurisdiction is proper only in the state courts. This Court is satisfied that, if the FDIC is proceeding in its corporate capacity, jurisdiction in this Court is proper; the question is whether the FDIC is proceeding as receiver or in its corporate capacity.

[1] The capacity question is resolved by addressing the second issue: Does the FDIC as corporation have the right to draw on a non-transferable letter of credit issued by the Bank of Boulder to the Dominion Bank of Denver? The letter of credit was issued by the Bank of Boulder to secure a promissory note from Gil Reed in favor of the Dominion Bank of Denver for $22,500. Mr. Reed defaulted on the promissory note and the FDIC, which was appointed receiver by the State Banking Commissioner, is attempting to enforce the letter of credit. The letter of credit did not explicitly state that it was

transferable or assignable. Therefore, by statute, the letter of credit is non-transferable. The Uniform Commercial Code provision, which is enacted in Colorado as C.R.S. § 4-5-116(1), provides that "the right to draw under a credit can be tranferred or assigned only when the credit is expressly designated as transferable or assignable." The letter of credit specifically states: "This credit is subject to the 'Uniform Customs and Practice for Documentary Credits' (1974 Revision), International Chamber of Commerce Brochure No. 290." Article 46 of the Uniform Customs also provides that the right to draw under a letter of credit cannot be assigned.

[2] This non-transferable letter of credit was transferred by operation of law from Dominion Bank of Denver to the State Banking Commissioner, C.R.S. § 11-5-102, and by the State Banking Commissioner to the FDIC as receiver, pursuant to statute, C.R.S. § 11-5-105. While these "transfers" appear to be legitimate, the transfer from FDIC as receiver to FDIC Corporation does not. The state court judge, in his Order Approving Sale of Assets and Transfer of Liabilities of Receiver, approved a "sale" of certain assets, including the letter of credit at issue, from the "FDIC as Receiver of the Bank . . . to the FDIC in its corporate capacity." Exhibit C to plaintiff's Brief in Opposition to Defendant's Motion to Dismiss. This sale was a transaction in violation of the non-transferability requirement of the letter of credit.

It was the sale from FDIC as receiver to FDIC as corporation that created the Catch-22 problem. If the transfer was valid, then the FDIC is proceeding in its corporate capacity and jurisdiction in this Court is proper. If, on the other hand, the transfer was a violation of the terms of the letter of credit, then the FDIC may not proceed in its corporate capacity but must proceed in its capacity as receiver. If the FDIC is proceeding as receiver, however, jurisdiction is proper in the

state courts but not the federal court, pursuant to 12 U.S.C. § 1819.

[3] The Court concludes that the sale of the letter of credit to FDIC in its corporate capacity is a violation of the terms of the letter of credit. Defendant's counsel conceded at the hearing that, in light of this ruling, the transfer was void. Accordingly, the FDIC as receiver is the proper beneficiary to draw on the nontransferable letter of credit. The FDIC as corporation is not properly before this Court and the Motion to Dismiss is granted. The FDIC may proceed as receiver, however, in the state court. Therefore, it is

ORDERED that defendant Bank of Boulder's Motion to Dismiss is granted without prejudice to suit by the FDIC as receiver in the state court.

APPENDIX B

UNITED STATES CODE

§ 1819. Incorporation; powers; seal

Upon June 16, 1933, the Corporation shall become a body corporate and as such shall have power—

Fourth. To sue and be sued, complain and defend, in any court of law or equity, State or Federal. All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; and the Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court for the district or division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect, except that any such suit to which the Corporation is a party in its capacity as receiver of a State bank and which involves only the rights or obligations of depositors, creditors, stockholders, and such State bank under State law shall not be deemed to arise under the laws of the United States. No attachment or execution shall be issued against the Corporation or its property before final judgment in any suit, action, or proceeding in any State, county, municipal, or United States court. The Board of Directors shall designate an agent upon whom service of process may be made in any State, Territory, or jurisdiction in which any insured bank is located.

Eighth. To make examinations of and to require information and reports from banks, as provided in this chapter.

Ninth. To act as receiver.

§ 1821. Permanent Insurance Fund

(b) Liquidation as closing of bank

For the purposes of this chapter an insured bank shall be deemed to have been closed on account of inability to meet the demands of its depositors in any case in which it has been closed for the purpose of liquidation without adequate provision being made for payment of its depositors.

(e) Corporation as receiver of State banks

Whenever any insured State bank (except a District bank) or any insured branch (other than a Federal branch) of a foreign bank shall have been closed by action of its board of directors or by the authority having supervision of such bank, as the case may be, on account of inability to meet the demands of its depositors, the Corporation shall accept appointment as receiver thereof, if such appointment is tendered by the authority having supervision of such bank and is authorized or permitted by State law. With respect to any such insured State bank or insured branch of a foreign bank, the Corporation as such receiver shall possess all the rights, powers and privileges granted by State law to a receiver of a State bank.

(g) Subrogation

In the case of a closed national bank, insured branch of a foreign bank, or District bank, or closed insured Federal savings bank, the Corporation, upon the payment to any depositor as provided in subsection (f) of this section, shall be subrogated to all rights of the depositor against the closed bank to the extent of such payment. In the case of any other closed insured bank, the Corporation shall not make any payment to any depositor until the right of the Corporation to be subrogated to the rights of such depositor on the same basis as provided in the case of a closed national bank under

this chapter shall have been recognized either by express provision of State law, by allowance of claims by the authority having supervision of such bank, by assignment of claims by depositors, or by any other effective method. In the case of any closed insured bank or closed insured branch of a foreign bank, such subrogation shall include the right on the part of the Corporation to receive the same dividends from the proceeds of the assets of such closed bank and recoveries on account of stockholders' liability as would have been payable to the depositor on a claim for the insured deposit, but such depositor shall retain his claim for any uninsured portion of his deposit: *Provided,* That, with respect to any bank which closes after May 25, 1938, the Corporation shall waive, in favor only of any person against whom stockholders' individual liability may be asserted, any claim on account of such liability in excess of the liability, if any, to the bank or its creditors, for the amount unpaid upon his stock in such bank: but any such waiver shall be effected in such manner and on such terms and conditions as will not increase recoveries or dividends on account of claims to which the Corporation is not subrogated: *Provided further,* That the rights of depositors and other creditors of any State bank shall be determined in accordance with the applicable provisions of State law.

§ 1823. Corporation monies

(c) Assistance to insured banks

(1) The Corporation is authorized, in its sole discretion and upon such terms and conditions as the Board of Directors may prescribe, to make loans to, to make deposits in, to purchase the assets or securities of, to assume the liabilities of, or to make contributions to, any insured bank—

(A) if such action is taken to prevent the closing of such insured bank;

(B) if, with respect to a closed insured bank, such action is taken to restore such closed insured bank to normal operation; or

(C) if, when severe financial conditions exist which threaten the stability of a significant number of insured banks or of insured banks possessing significant financial resources, such action is taken in order to lessen the risk to the Corporation posed by such insured bank under such threat of instability.

(2)(A) In order to facilitate a merger or consolidation of an insured bank described in subparagraph (B) with an insured institution or the sale of assets of such insured bank and the assumption of such insured bank's liabilities by an insured institution, or the acquisition of the stock of such insured bank, the Corporation is authorized, in its sole discretion and upon such terms and conditions as the Board of Directors may prescribe—

(i) to purchase any such assets or assume any such liabilities;

(ii) to make loans or contributions to, or deposits in, or purchase the securities of, such insured institution or the company which controls or will acquire control of such insured institution;

(iii) to guarantee such insured institution or the company which controls or will acquire control of such insured institution against loss by reason of such insured institution's merging or consolidating with or assuming the liabilities and purchasing the assets of such insured bank or by reason of such company acquiring control of such insured bank; or

(iv) to take any combination of the actions referred to in subparagraphs (i) through (iii).

(B) For the purpose of subparagraph (A), the insured bank must be an insured bank—

(i) which is closed;

(ii) which, in the judgment of the Board of Directors, is in danger of closing; or

(iii) which, when severe financial conditions exist which threaten the stability of a significant number of insured banks or of insured banks possessing significant financial resources, is determined by the Corporation, in its sole discretion, to require assistance under subparagraph (A) in order to lessen the risk to the Corporation posed by such insured bank under such threat of instability.

(3) The Corporation may provide any person acquiring control of, merging with, consolidating with or acquiring the assets of an insured bank under subsection (f) of this section with such financial assistance as it could provide an insured institution under this subsection.

(4)(A) No assistance shall be provided under this subsection in an amount in excess of that amount which the Corporation determines to be reasonably necessary to save the cost of liquidating, including paying the insured accounts of, such insured bank, except that such restriction shall not apply in any case in which the Corporation determines that the continued operation of such insured bank is essential to provide adequate banking services in its community.

(B) The Corporation may not use its authority under this subsection to purchase the voting or common stock of an insured bank. Nothing in the preceding sentence shall be construed to limit the ability of the Corporation to enter into and enforce covenants and agreements that it determines to be necessary to protect its financial interest.

(5)(A) During any period in which an insured bank has received assistance under this subsection and such assistance is still outstanding, such insured bank may defer the payment of any State or local tax which is determined on the basis of the deposits held by such insured bank or of the interest or dividends paid on such deposits.

(B) When such insured bank no longer has any outstanding assistance, such insured bank shall pay all taxes which were deferred under subparagraph (A). Such payments shall be made in accordance with a payment plan established by the Corporation, after consultation with the applicable State and local taxing authorities.

(6) Any assistance provided under this subsection may be in subordination to the rights of depositors and other creditors.

(7) In its annual report to the Congress, the Corporation shall report the total amount it has saved, or estimates it has saved, by exercising the authority provided in this subsection.

(8) For purposes of this subsection, the term "insured institution" means an insured bank as defined in section 1813 of this title or an insured institution as defined in section 1724 of this title.

(d) Sale of assets to Corporation

Receivers or liquidators of insured banks closed on account of inability to meet the demands of their depositors shall be entitled to offer the assets of such banks for sale to the Corporation or as security for loans from the Corporation, upon receiving permission from the appropriate State authority in accordance with express provisions of State law in the case of insured State banks. The proceeds of every such sale or loan shall be utilized for the same purposes and in the same manner as other funds realized from the liquidation of the assets of such banks. In any case where prior to September 21,

1950, the Comptroller of the Currency has appointed a receiver of a closed national bank other than the Corporation, he may, in his discretion, pay dividends on proved claims at any time after the expiration of the period of advertisement made pursuant to section 193 of this title, and no liability shall attach to the Comptroller of the Currency or to the receiver of any such national bank by reason of any such payment for failure to pay dividends to a claimant whose claim is not proved at the time of any such payment. The Corporation, in its discretion, may make loans on the security of or may purchase and liquidate or sell any part of the assets of an insured bank which is now or may hereafter be closed on account of inability to meet the demands of its depositors, but in any case in which the Corporation is acting as receiver of a closed insured bank, no such loan or purchase shall be made without the approval of a court of competent jurisdiction.

(e) Agreements against interests of Corporation

No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.

(f) Assisted emergency interstate acquisitions

(1) Nothing contained in paragraph (2) or (3) shall be construed to limit the Corporation's powers in subsection (c)

of this section to assist a transaction under paragraph (2) or (3).

(2)(A) Whenever an insured bank with total assets of $500,000,000 or more (as determined from its most recent report of condition) is closed, the Corporation, as receiver, may, in its discretion and upon such terms and conditions as the Corporation may determine, arrange the sale of assets of the closed bank and the assumption of the liabilities of the closed bank, including the sale of such assets to and the assumption of such liabilities by an insured depository institution located in the State where the closed bank was chartered but established by an out-of-State bank or holding company. Where otherwise lawfully required, a transaction under this subsection must be approved by the primary Federal or State supervisor of all parties thereto.

(B)(i) Before making a determination to take any action under subparagraph (A), the Corporation shall consult the State bank supervisor of the State in which the closed insured bank was chartered.

(ii) The State bank supervisor shall be given a reasonable opportunity, and in no event less than forty-eight hours, to object to the use of the provisions of this paragraph. Such notice may be provided by the Corporation prior to its appointment as receiver, but in anticipation of an impending appointment.

(iii) If the State supervisor objects during such period, the Corporation may use the authority of this paragraph only by a unanimous vote of the Board of Directors. The Board of Directors shall provide to the State supervisor, as soon as practicable, a written certification of its determination.

(3)(A)(i) Whenever the Corporation has determined, in its discretion, that an insured bank organized in mutual form with total assets of $500,000,000 or more (as determined

from its most recent report of condition) is in danger of closing, the insured bank may merge with or its assets may be purchased by and its liabilities assumed by another institution, including an insured depository institution located in the State where the insured bank is chartered but established by an out-of-State bank or holding company.

(ii) Where otherwise lawfully required, a transaction under this subsection must be approved by the primary Federal or State supervisor of all parties thereto.

(B) The Corporation may make a determination under paragraph (A) only where the board of trustees of the insured bank and the appropriate Federal or State chartering authority have specified in writing that the bank is in danger of closing and have requested in writing that the Corporation assist a merger or a purchase.

(C)(i) Before making a determination under subparagraph (A), the Corporation shall consult the State bank supervisor of the State in which the bank in danger of closing is chartered.

(ii) The State bank supervisor shall be given a reasonable opportunity, and in no event less than forty-eight hours, to object to the use of the provisions of this paragraph.

(iii) If the State supervisor objects during such period, the Corporation may use the authority of this paragraph only by a unanimous vote of the Board of Directors. The Board of Directors shall provide to the State supervisor, as soon as practicable, a written certification of its determination.

(4)(i) Notwithstanding section 1842(d) of this title or any other provision of law, State or Federal, or the constitution of any State, an institution that merges with or acquires an insured bank under paragraph (2) or (3) is authorized to be and shall be operated as a subsidiary of an out-of-State bank or bank holding company, except that an out-of-state bank

may operate the resulting institution as a subsidiary only if such ownership is otherwise specifically authorized.

(ii) Any subsidiary created by operation of this subsection may retain and operate any existing branch or branches of the institution merged with or acquired under paragraph (2) or (3), but otherwise shall be subject to the conditions upon which a national bank may establish and operate branches in the State in which such insured institution is located.

(iii) No insured institution acquired under this subsection shall after it is acquired move its principal office or any branch office which it would be prohibited from moving if the institution were a national bank.

§ 1830. Policy of nondiscrimination against non-member banks

It is not the purpose of this chapter to discriminate in any manner against State non-member banks and in favor of national or member banks; but the purpose is to provide all banks with the same opportunity to obtain and enjoy the benefits of this chapter. No bank shall be discriminated against because its capital stock is less than the amount required for eligibility for admission into the Federal Reserve System.

§ 1831d. State-chartered insured banks and insured branches of foreign banks

(a) Interest rates

In order to prevent discrimination against State-chartered insured banks, including insured savings banks, or insured branches of foreign banks with respect to interest rates, if the applicable rate prescribed in this subsection exceeds the rate such State bank or insured branch of a foreign bank would be permitted to charge in the absence of this

subsection, such State bank or such insured branch of a foreign bank may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 1 per centum in excess of the discount rate on 90-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve District where such State bank or such insured branch of a foreign bank is located or at the rate allowed by the laws of the state, territory, or district where the bank is located, whichever may be greater.

COLORADO UNIFORM COMMERCIAL CODE

4-5-103. Definitions. (1) In this article unless the context otherwise requires:

(a) "Credit" or "letter of credit" means an engagement by a bank or other person made at the request of a customer and of a kind within the scope of this article (section 4-5-102) that the issuer will honor drafts or other demands for payment upon compliance with the conditions specified in the credit. A credit may be either revocable or irrevocable. The engagement may be either an agreement to honor or a statement that the bank or other person is authorized to honor.

(c) An "issuer" is a bank or other person issuing a credit.

(d) A "beneficiary" of a credit is a person who is entitled under its terms to draw or demand payment.

(g) A "customer" is a buyer or other person who causes an issuer to issue a credit. The term also includes a bank which procures issuance or confirmation on behalf of that bank's customer.

4-5-109. Issuer's obligation to its customer. (1) An issuer's obligation to its customer includes good faith and observance of any general banking usage but unless otherwise agreed, does not include liability or responsibility:

(a) For performance of the underlying contract for sale or other transaction between the customer and the beneficiary; or

(b) For any act or omission of any person other than itself or its own branch or for loss or destruction of a draft, demand, or document in transit or in the possession of others; or

(c) Based on knowledge or lack of knowledge of any usage of any particular trade.

(2) An issuer must examine documents with care so as to ascertain that on their face they appear to comply with the terms of the credit but unless otherwise agreed, assumes no liability or responsibility for the genuineness, falsification, or effect of any document which appears on such examination to be regular on its face.

4-5-112. Time allowed for honor or rejection—withholding honor or rejection by consent "presenter". (1) A bank to which a documentary draft or demand for payment is presented under a credit may without dishonor of the draft, demand, or credit:

(a) Defer honor until the close of the third banking day following receipt of the documents; and

(b) Further defer honor if the presenter has expressly or impliedly consented thereto. Failure to honor within the time here specified constitutes dishonor of the draft or demand and of the credit.

(2) Upon dishonor the bank may, unless otherwise instructed, fulfill its duty to return the draft or demand and

the documents by holding them at the disposal of the presenter and sending him an advice to that effect.

(3) "Presenter" means any person presenting a draft or demand for payment for honor under a credit even though that person is a confirming bank or other correspondent which is acting under an issuer's authorization.

4-5-116. Transfer and assignment. (1) The right to draw under a credit can be transferred or assigned only when the credit is expressly designated as transferable or assignable.

(2) Even though the credit specifically states that it is nontransferable or nonassignable, the beneficiary may before performance of the conditions of the credit assign his right to proceeds. Such an assignment is an assignment of an account under article 9 of this title on secured transactions and is governed by that article, except that:

(a) The assignment is ineffective until the letter of credit or advice of credit is delivered to the assignee, which delivery constitutes perfection of the security interest under article 9 of this title; and

(b) The issuer may honor drafts or demands for payment drawn under the credit until it receives a notification of the assignment signed by the beneficiary which reasonably identifies the credit involved in the assignment and contains a request to pay the assignee; and

(c) After what reasonably appears to be such a notification has been received, the issuer may without dishonor refuse to accept or pay even to a person otherwise entitled to honor until the letter of credit or advice of credit is exhibited to the issuer.

(3) Except where the beneficiary has effectively assigned his right to draw or his right to proceeds, nothing in this

section limits his right to transfer or negotiate drafts or demands drawn under the credit.

COLORADO BANKING CODE OF 1957

11-1-102. Definitions. As used in this code, unless the context otherwise requires:

(3) "Commissioner" means the state bank commissioner appointed and serving pursuant to section 11-20-101 who shall be the commissioner of banking referred to in articles 1 to 11 of this title and who shall administer and enforce the provisions of said articles.

11-2-102. Banking board. (1) There is hereby established in the division a banking board which shall consist of seven members, one of whom shall be the commissioner who shall be chairman.

11-5-102. Involuntary liquidation by commissioner—reorganization. (1) Except as otherwise provided in this code, only the commissioner may take possession of a state bank if, after a hearing before the banking board, the banking board shall find: The bank's capital is impaired or it is otherwise in an unsound condition; the bank's business is being conducted in an unlawful or unsound manner; the bank is unable to continue normal operations; examination of the bank has been obstructed or impeded; or control of the bank has been assumed by any person or persons convicted of fraud or a felony in this state or any other jurisdiction, or by any partnership, association, or corporation controlled, directly or indirectly, by any person so convicted, unless the board determines that such person has been duly

rehabilitated or otherwise that the bank will be honestly and efficiently managed.

(2) (a) The commissioner shall take possession by posting upon the premises a notice reciting that he is assuming possession pursuant to this code and the time, not earlier than the posting of the notice, when his possession shall be deemed to commence. A copy of the notice shall be filed in a court of general jurisdiction in the county in which the institution is located. The commissioner shall notify the federal reserve bank of the district of taking possession of any state bank which is a member of the federal reserve system and shall notify the federal deposit insurance corporation of taking possession of any state bank which is a member of the federal deposit insurance corporation.

(b) When the commissioner has taken possession of a state bank, he shall be vested with the full and exclusive power of management and control, including the power to continue or to discontinue the business, to stop or to limit the payment of its obligations, to employ any necessary assistants, including legal counsel, to execute any instrument in the name of the bank, to commence, defend, and conduct in its name any action or proceeding to which it may be a party, to terminate his possession by restoring the bank to its board of directors, and to reorganize or liquidate the bank in accordance with this code. As soon as practicable after taking possession, the commissioner shall make an inventory of the assets and file a copy thereof with the court in which the notice of possession was filed.

(c) When the commissioner is in possession and while his possession continues, there shall be a postponement, until six months after such taking, of the date upon which any period of limitation fixed by statute or agreement would otherwise expire on a claim or right of action of the bank, or upon which a review must be taken, or a pleading, or other document

must be filed, by the bank in any pending action or proceeding.

(3)(a) If, in the opinion of the commissioner, an emergency exists which may result in serious losses to the depositors, he may, with the approval of the banking board, take possession of a state bank without a prior hearing. Within ten days after the commissioner has taken possession, any interested person may file an application with the banking board for an order vacating such possession. The banking board shall grant the application if it finds that the action of the commissioner was unauthorized.

(b) If the commissioner shall determine to liquidate the state bank, he shall give such notice of his determination to the directors, stockholders, depositors, and creditors as the banking board may prescribe. Any objection to such determination shall be filed with the banking board within ten days after such notice. Unless within ten days thereafter the banking board issues an order staying the liquidation, or unless the banking board directs the commissioner to tender to the federal deposit insurance corporation the appointment as liquidator under section 11-5-105, the commissioner shall proceed to liquidate the institution, upon first providing a bond executed by some surety company authorized to do business in this state, running to the people of the state of Colorado, which meets with the approval of the banking board, for the faithful discharge of his duties in connection with such liquidation and the accounting for all moneys coming into his hands. The cost of such bond shall be paid from the assets of the bank. Suit may be maintained on such bond by any person injured by a breach of conditions thereof.

(c) If the commissioner determines to reorganize the state bank or if the banking board, after staying its liquidation, orders such reorganization, the commissioner, after according a hearing to all interested persons, shall enter an order proposing a reorganization plan. A copy of the plan shall be

sent to each depositor and creditor who will not receive payment of his claim in full under the plan, together with notice that, unless within fifteen days the plan is disapproved in writing by persons holding one-third or more of the aggregate amount of such claims, the commissioner will proceed to effect the reorganization. A department, agency, or political subdivision of this state holding a claim which will not be paid in full is authorized to participate as any other creditor.

(4) No judgment, lien, or attachment shall be executed upon any asset of the state bank while it is in the possession of the commissioner. Upon the election of the commissioner, in connection with a liquidation or reorganization:

(a) Any lien or attachment, other than an attorney's or mechanic's lien, obtained upon any asset of the state bank during the commissioner's possession, or within four months prior to commencement thereof, shall be vacated and voided, except liens created by the commissioner while in possession;

(b) Any transfer of an asset of the state bank made after or in contemplation of its insolvency, with intent to effect a preference, shall be voided.

(5) With the approval of the banking board, the commissioner may borrow money in the name of the state bank and may pledge its assets as security for the loan.

(6) All necessary and reasonable expenses of the commissioner's possession of a state bank and of its reorganization or liquidation shall be defrayed from the assets thereof.

11-5-103. Reorganization plan. (1) A plan of reorganization shall not be prescribed under this code unless:

(a) The plan is feasible and fair to all classes of depositors, creditors, and stockholders;

(b) The aggregate face amount of the interest accorded to any class of depositors, creditors, or stockholders under the plan does not exceed the value of the assets upon liquidation, less the full amount of the claims of all prior classes, subject to any fair adjustment for new capital that any class will pay in under the plan;

(c) The plan provides for the issuance of capital stock and, if necessary, debentures in an amount that will provide an adequate ratio to deposits;

(d) Any exchange of new common stock for obligations or stock of the bank will be effected in inverse order to the priorities in liquidation of the classes that will retain an interest in the bank and upon terms that fairly adjust any change in the relative interests of the respective classes that will be produced by the exchange;

(e) The plan assures the removal of any director, officer, or employee responsible for any unsound or unlawful action or the existence of an unsound condition;

(f) Any merger or consolidation provided by the plan conforms to the requirements of this code.

(2) If, in the course of reorganization, supervening conditions render the plan unfair or its execution impractical, the commissioner may modify the plan or liquidate the institution. Any such action shall be taken by order of the banking board upon appropriate notice.

11-5-104. Liquidation by commissioner—procedure. (1) In liquidating a state bank, the commissioner may exercise any power thereof, but he shall not, without the approval of the court in which notice of possession has been filed:

(a) Sell any asset of the bank having a value in excess of five hundreds dollars;

(b) Compromise or release any claim if the amount of the claim exceeds five hundred dollars, exclusive of interest;

(c) Make any payment on any claim, other than a claim upon an obligation incurred by the commissioner, before preparing and filing a schedule of his determinations in accordance with this code.

(2) Within six months of the commencement of liquidation, the commissioner may, by his election, terminate any executory contract for services or advertising to which the state bank is a party, or any obligation of the bank as a lessee. A lessor who receives at least sixty days' notice of the commissioner's election to terminate the lease shall have no claim for rent, other than rent accrued to the date of termination, nor for damages for such termination.

(3) As soon after the commencement of liquidation as is practicable, the commissioner shall take the necessary steps to terminate all fiduciary positions held by the state bank and take such action as may be necessary to surrender all property held by the bank as a fiduciary and to settle its fiduciary accounts.

(4) The right of any agency of the United States insuring deposits to be subrogated to the rights of depositors upon payment of their claims shall not be less extensive than the law of the United States requires as a condition of the authority to issue such insurance or to make such payments to depositors of national banks.

(5) As soon after the commencement of liquidation as is practicable, the commissioner shall send notice of the liquidation to each known depositor, creditor, and lessee of a safe deposit box and bailor of property held by the bank at the address shown on the books of the institution. The notice shall also be published in a newspaper of general circulation in the county in which the institution is located once a week

for three successive weeks. The commissioner shall send with each notice a statement of the amount shown on the books of the institution to be the claim of the depositor or creditor. The notice shall demand that property held by the bank as bailee, or in a safe deposit box, be withdrawn by the person entitled thereto and the claim of a depositor or creditor, if the amount claimed differs from that stated in the notice to be due, be filed with the commissioner before a specified date, not earlier than sixty days thereafter, in accordance with the procedure prescribed in the notice.

(6) Safe deposit boxes, the contents of which have not been removed before the date specified, shall be opened by the commissioner. Sealed packages containing the contents of such box, with a certificate of inventory of contents, together with any unclaimed property held by the bank as bailee and certified inventories thereof, shall be held by the commissioner for six years unless sooner claimed by the person entitled thereto. After six years the commissioner may sell or otherwise appropriately dispose of the property. The proceeds of a sale shall be transferred and disposed of in accordance with the provisions of subsection (11) of this section.

(7) Within six months after the last day specified in the notice for the filing of claims, or within such longer period as may be allowed by the court in which notice of possession has been filed, the commissioner shall:

(a) Reject any claim if he doubts the validity thereof;

(b) Determine the amount, if any, owing to each known creditor or depositor and the priority class of his claim under this code;

(c) Prepare a schedule of his determinations for filing in the court in which notice of possession was filed;

(d) Notify each person whose claim has not been allowed in full and publish once a week for three successive weeks, in a newspaper of general circulation in the county in which the institution is located, a notice of the time when and the place where the schedule of determinations will be available for inspection and the date, not sooner than thirty days thereafter, when the commissioner will file his schedule in court.

(8) Within twenty days after the filing of the commissioner's schedule, any creditor, depositor, or stockholder may file an objection to any determination made which adversely affects such objector. Any objections so filed shall be heard and determined by the court upon such notice to the commissioner and interested claimants as the court may prescribe. If the objection is sustained, the court shall direct an appropriate modification of the schedule. After filing his schedule, the commissioner may, from time to time, make partial distribution to the holders of claims which are undisputed or have been allowed by the court if a proper reserve is established for the payment of disputed claims. As soon as is practicable after the determination of all objections, the commissioner shall make final distribution.

(9) (a) On liquidation of a state bank, after payment of federal deposit insurance, claims for payment have the following priority:

(I) Obligations incurred by the commissioner, fees and assessments due to the division, and expenses of liquidation, all of which may be covered by a proper reserve of funds;

(II) Claims of depositors having an approved claim against the general liquidating account of the bank;

(III) Claims of general creditors having an approved claim against the general liquidating account of the bank;

(IV) Claims otherwise proper that were not filed within the time prescribed by this code;

(V) Approved claims of subordinate creditors; and

(VI) Claims of stockholders of the bank.

(b) On liquidation of a state bank, after payment of federal deposit insurance, claims by governmental units for payment of uninsured deposits collateralized pursuant to the "Public Deposit Protection Act of 1975", article 10.5 of this title, shall be governed by the provisions of said article. Claims by governmental units for payment of uninsured deposits not collateralized pursuant to article 10.5 of this title shall have the same priority assigned to depositors under subparagraph (II) of paragraph (a) of this subsection (9).

(10) Any assets remaining after all claims have been paid shall be distributed to the stockholders in accordance with their respective interests.

(11) Unclaimed funds remaining after completion of the liquidation shall be retained for six years by the commissioner unless sooner claimed by the owner. At the expiration of such period, the remaining sum shall be transferred to the treasury of the county in which the bank is located. The county treasurer and his successors shall hold such money in trust for a period of six years, unless the same is sooner paid out to the beneficial owner or owners thereof, or a suit is instituted to recover such money or a portion thereof. Any money remaining in said fund six years after the same is paid into the treasury of the county, for the recovery of which no action is pending, shall be transferred to the general fund of the county, and all rights of the former beneficial owners therein to recover the same shall be forever barred.

(12) When the assets have been distributed in accordance with this code, the commissioner shall file an account with the court. Upon approval thereof, the commissioner shall be

relieved of liability in connection with the liquidation, and shall cancel the charter.

11-5-105. Federal deposit insurance corporation as liquidator. (1) The federal deposit insurance corporation, created by section 12B of the "Federal Reserve Act", as amended, is authorized to act without bond as liquidator of any banking institution, the deposits in which are to any extent insured by said corporation and which banking institution shall have been closed on account of inability to meet the demands of its depositors or for any other lawful cause.

(2) In the event of such closing, the commissioner, upon order of the banking board, may tender to said corporation the appointment as liquidator of such banking institution.

(3) Upon being notified in writing of the acceptance of such an appointment, the commissioner shall forthwith file in the office of the clerk and recorder in the county in which the bank is situated a certificate evidencing the appointment of the federal deposit insurance corporation. Upon the filing of such certificate, the possession of all the assets, business, and property of such bank of every kind and nature, wheresoever situated, shall be deemed transferred from such bank and the commissioner to the federal deposit insurance corporation. Without the execution of any instruments of conveyance, assignment, transfer, or endorsement, the title to all such assets and property shall be vested in the federal deposit insurance corporation, and the commissioner shall be forever thereafter relieved from all responsibility and liability in respect to the liquidation of such bank; except that the commissioner may retain jurisdiction over and responsibility for liquidation of eligible collateral pledged pursuant to the "Public Deposit Protection Act of 1975", article 10.5 of this title, to secure public deposits not insured by the federal deposit insurance corporation.

(4) If the corporation accepts said appointment, it has all the powers and privileges provided by the laws of this state with respect to the liquidation of a banking institution, its depositors, and other creditors.

11-5-106. Assets sold or pledged as security. (1) With respect to any banking institution closed on account of inability to meet the demands of its depositors or by action of the commissioner or by action of its directors or in the event of its insolvency or suspension, the special deputy commissioner or the liquidator of such institution, with the permission of said commissioner, may borrow from the federal deposit insurance corporation and furnish any part or all of the assets of said institution to said corporation as security for a loan from same, but, if said corporation is acting as such liquidator, the order of a court of record of competent jurisdiction shall be first obtained approving such loan. Upon the order of a court of record of competent jurisdiction, all or any part of the assets of such institution may be sold to the corporation by the commissioner, or by the liquidator with the permission of the commissioner.

(2) The provisions of this section shall not be construed to limit the power of any banking institution, the commissioner, or the liquidators to pledge or sell assets in accordance with any existing law.